THE CLAUSE

April-May-June, 2002

A Quarterly Publication of The Board of Contract Appeals Bar Association

Vol. XIII,
Issue 2

TABLE OF CONTENTS

Boards of Contract Appeals Bar Association
Board of Governors

President's Column
by
Peter A. McDonald
C.P.A., Esq.

President's Column

Please note the following events:

May 21st – Executive Policy Forum (David Metzger)(Gold Medal Firms Only).
June 7th (see below)– Trial Practice Committee (David Fowler, with Judges DeGraff, Fennessy, and Williams, as well as one judge each from the Postal BCA and DOE BCA).
September 12th (see below) – Trial Practice Committee (David Fowler, with Judges Daniels, Kienlen, McMichael, and Page).
August – Annual dues notices, due NLT September 30th.
October 23rd – BCABA Annual Meeting (COL Neds).

Those of you who want to be considered for a Board of Governor vacancy (three-year term) or other position with the BCABA – or if you want to nominate someone else – please contact the Nominations Committee chaired by Don Barnhill (210-491-9090).

The Third Annual Executive Policy Forum, chaired by David Metzger, will be held at the KPMG Building, 2001 M Street NW, Washington, DC, from noon on (lunch will be served). It will be preceded by a brief Board of Governors meeting. Of course, attendance at the Executive Policy Forum is by invitation only, and is a benefit conferred on our Gold Medal Firms.

I am very happy to report the overwhelmingly positive response to the Trial Practice Committee meetings, which will be heavily attended. Both meetings will be at the KPMG Building, 2001 M Street NW, Washington, DC, from noon to two-ish (lunch will be served). The subject of these informal meetings, which are intended for our junior members, is "How to Present a Government Contract Case," a subject not taught in any law school.

Finally, we have a new Legislative Affairs Committee, which Barbara Bonfiglio has graciously agreed to chair. She is a well-known, experienced Capitol Hill practitioner, and we are very happy to have her services (see her article below). Of course, the Administration's recent initiative to consolidate the BCAs is a matter of great concern to the BCABA.

****

News About Dues

- Annual dues notices are mailed out in early August.
- The dues are $30 for government employees, and $45 for everyone else.
- Payments are due NLT September 30th.
- There are no second notices.
- Gold Medal firms are those who have all their government contract practitioners as members.
- Individuals who do not pay their dues by September 30th will not appear in the annual BCABA Directory.

About the BCABA

Membership in the BCABA is open to any attorney interested in the field of government contract law. The BCABA annual meeting is held in October, at which time the annual BCABA Directory is distributed. The BCABA's publication, *The Clause*, is published quarterly. At the annual meeting, the Writing Award is presented for the year's best article, and the Life Service Award is presented to the individual who has done the most to further the goals of the BCABA.

The BCABA Constitution and By-laws are available at our website (www.bcabar.org).

EDITOR'S COLUMN

Clarence D. “Hugh” Long, III

Once again I have the easy and enjoyable job of producing a good magazine based on the fine work of others. This time we have a superb article from Major Matt Ruane on the Defense Production Act of 1950, a little known relic of the early days of the cold war which is still with us and comes back to life whenever there is a national emergency and Uncle Sam really, really needs to buy something right now. 9/11 is possibly one of those times. Major Ruane has graced us with the first publishing of his article, although it will be published elsewhere as well.

Next we have Shakespeare and contract law, an interesting article concerning the legal ability of a great playwright, one of whose characters (not mentioned here) was less than enthusiastic about the legal profession. His companion responded with a reasonable argument that lawyers are here to protect us all, including the people who hate them. But we all know which line gets the most applause. Roy Goldberg has given us a humorous and informative article

Chris Yukins has given us a fine article on GSA fee-for-service activities.

JOE MCDADE PROMOTED- NEW DIVISION CREATED!

I am pleased to announce that Joe McDade has been selected as the new Deputy General Counsel for Dispute Resolution. He will head this division of GC newly created by the Secretary responsible for the development and implementation of the Air Force Alternative Dispute Resolution (ADR) Program. The Air Force ADR Program, and the problem-solving mindset that it fosters, are designed to support a number of strategic transformations underway in the Air Force. For example, SAF/GCD will work closely with the Air Force Acquisition Center of Excellence to support the Air Force's Agile Acquisition initiatives; it will play a key role in promoting the use of ADR in civilian workplace disputes; and it will begin the application of ADR techniques to other areas of the law, such as environmental and international matters. The vision for this office is to become the recognized negotiation and dispute resolution experts not just in the Air Force, but in the federal government. They will continue to develop the policy and Air Force instructions for this effort and working with field elements to assure that our implementation continues to win awards for the Air Force. With the success the program has already had to date, we are off to a great start in partnering with all of you.

Mary L. Walker
General Counsel of the Air Force
(703) 697-0941

You are invited to the annual BCA Judges Reception from 4:00 p.m. to 7:30 p.m. on May 16th at the Westin Embassy Row, 2100 Massachusetts Avenue (DuPont Circle Metro).

This event is jointly sponsored by the D.C. Bar, the Federal Bar Association, and the BCABA.

Preceding the Reception will be a seminar on "The Future of A-76" with the following speakers: Daniel I. Gordon (Associate General Counsel, Procurement Law, GAO); Angela B. Styles (Administrator, OFPP); Robert M. Tobias (Professor, American University); and Stan Z. Soloway (President, Professional Services Council). The speakers will discuss the Report of the Commercial Activities Panel (to be issued May 1st), which is expected to address the government's possible transfer of commercial activities currently performed by federal employees to the private sector, the FAIR Act inventories, and the future of OMB Circular A-76.

To attend, please complete page 3 of the attached form and forward it to the address shown.

[The brochure is at http://www.contracts.ogc.doc.gov/cld/events/bca051602.pdf]

THE DEFENSE PRODUCTION ACT OF 1950[1]: VITAL DEFENSE AND EMERGENCY ACQUISITION AUTHORITY FOR 2002

MAJOR MATTHEW J. RUANE*

[1] 50 U.S.C.S. app. § 2061-2171 (LEXIS 2001) (hereinafter, the "DPA").

* MATTHEW J. RUANE, Major, Judge Advocate, United States Air Force. Presently assigned as Student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. J.D., 1995, University of Nebraska College of Law; B.S., 1987, University of North Carolina at Charlotte. Previous assignments include RC-135 "Rivet Joint" Instructor Mission Director/Electronic Warfare Officer and Squadron Executive Officer, 343d Reconnaissance Squadron, Offutt Air Force Base, Nebraska, 1989-1992; 1700th Reconnaissance Squadron (Provisional), Riyadh Air Base, Saudi Arabia, 1990-1991; Law Student, Lincoln, Nebraska, 1992-1995; 55th Wing Legal Office, Offutt Air Force Base, Nebraska 1992-1995 (law intern); Headquarters, Air Force Office of Special Investigations, Bolling Air Force Base, Washington D.C., 1994 (law intern); Headquarters, Air Warfare Center, Nellis Air Force Base, Nevada, 1995-1998 (Chief of Legal Assistance/Assistant Claims Officer, 1995-1996; Chief of Claims, 1996-1997; Chief of Contract Law, 1997-1998; Trial Counsel, 1995-1998); Headquarters, Eighth Air Force, Barksdale Air Force Base, Louisiana, 1998-2000 (Assistant Staff Judge Advocate, 1998; Chief of Operations Law, 1999-2000; Chief of Military Law, 2001). Member of the bars of Nebraska, the Court of Appeals for the Armed Forces, and the United States Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 50th Judge Advocate Officer Graduate Course. The views expressed in this article are those of the author only. They do not necessarily reflect those of the U.S. Air Force or any other governmental entity.

Contact Information: email: mruane@afls1.jag.af.mil

Table of Contents

Congresswoman Maloney of New York: New York City has been a target repeatedly of major terrorist attacks in recent years. Could you provide an example of how the Defense Production Act (DPA) could be used in the event of ... an attack or major disaster?

Federal Emergency Management Agency General Counsel Michael Brown: The primary example I can think of is, if it was devastating to Manhattan—just destroys all of Manhattan—and we need to make sure, in terms of consequence management, we're going to get food, water, electricity, everything we need to get in to a population of that size and magnitude, where we cannot draw upon ordinary suppliers, ordinary contractual agreements, ordinary arrangements of the Staff, DPA would allow us to do that. That's the kind of event that we think, in terms of a catastrophic event, the DPA may come into play.[**]

[**] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth of the Committee on Financial Services*, 107th Cong. 9 (June 27, 2001).

I. Introduction

The September 11th attacks should inspire the government acquisition community to carefully study the Defense Production Act of 1950[2] to ensure that its powerful authorities over the civilian economy are judiciously and deliberately[3] used and only very

[2] *Id*.

[3] In 1951, Mr. Alfred L. Scanlan, Assistant Counsel of the Munitions Board, Department of Defense, assessed the DPA's viability as follows:

> If the American people persist in the belief that the present hour is one of dire threat to our national security, there should be no doubt that it can do the job for which it was passed. On the other hand, if their will to sacrifice wavers, if they prefer their "butter" to their "guns," or if they lose patience in attempting to follow a course of action which may achieve both, then the DPA will soon be wiped off the books, either by express congressional action, or by its negation in actual practice. The opinion of this writer, either of the last two alternatives would indeed be a fool's choice.

carefully revised.[4] Generally, the DPA "affords to the President an array of authorities to shape defense preparedness programs and to take appropriate steps to maintain and enhance the defense industrial and technological base."[5] More specifically, the DPA provides two distinct types of powers: One is the future-oriented authority to expand and protect the United States industrial base under titles III[6] and VII.[7] The other is the title I authority[8] to "conscript industry"[9] to ensure the timely availability of products, materials,

---

Alfred L. Scanlan, *The Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185 at 222 (1951). The DPA's continued existence is testament to the fact that the American people remain committed to a robust national defense industrial capability. For history and analysis of the DPA shortly after its enactment in 1950, *See generally*, Rodolfo A. Correa, *The Organization for Defense Mobilization*, Vol. 13, No. 1 FED. B. J. 1 (1952) (reviewing governmental structure conducting Korean War mobilization); Harold Levanthal, *The Organization for Defense Mobilization, Part II: Price Controls Under the Defense Production Act, as Amended*, 13 FED B. J. 99 (1952); Peter H. Haskell, *Production Under the Control Materials Plan*, 13 FED. B. J. 16 (1952); Robert H. Winn, *Enforcement of National Production Authority's Orders and Regulations*, 13 FED. B. J. 64 (1952); Alfred L. Scanlan, *The Defense Production Act of 1950*, 3 RUTGERS L. REV. 518 (1951); Donald S. Frey, *Maintaining Economic Freedom Under the Defense Act of 1950*, 18 U. CHI. L. REV. 218 (1951).

[4] *Carlucci, Costello Urge Revamp of Defense Production Act*, 52 FED. CONT. REP. 156 (Jul. 17, 1989); David E. Lockwood, *Defense Production Act: Purpose and Scope*, CONG. RES. SERVICE (June 22, 2001) at 1 (noting that DPA revision requests and recommendations have foundered in the past decade because the DPA lacks a defined constituency); Lee M. Zeichner, *Use of the Defense Production Act of 1950 for Critical Infrastructure Protection*, (2001) *at* http://www.legalnet.com/Presentations/dpa.pdf. (last visited Mar.16, 2002) (recommending evaluation of DPA authorities to cope with criminal, terrorist, and enemy military threats to our national critical infrastructure); THE PRESIDENT'S COMM'N ON CRITICAL INFRASTRUCTURE PROTECTION, MAJOR FEDERAL LEGISLATION, A "LEGAL FOUNDATIONS" STUDY, REP. 6 OF 12 at 2 (1997), *at* http://www.ciao.gov/PCCIP/lf06.pdf (last visited Mar. 19, 2002)(suggesting that the DPA provides legal authority for coping with major disasters or attacks on critical infrastructure).

[5] 50 U.S.C.S. app. § 2062(a)(5)(LEXIS 2001).

[6] *Id*. § 2091-2099a.

[7] *Id*. § 2151-2171.

[8] *Id*. § 2071-2076.

[9] Karen Manos, *Wartime Contracting*, Conference Briefs, Government Contracting Year in Review Conference Covering 2001 (West Group 2001) (describing DPA priority contracting authority as "the ability to conscript industry"). The term also applies to allocation authority under the DPA but not to voluntary provisions related to expansion of the industrial base and energy production.

services, and facilities for defense preparedness and national emergency requirements.[10] Since September 11th, 2002, commentators have focused on the conscription power of title I and its ability to speed up delivery of scarce, critical goods and services[11] but it behooves us to survey all DPA authorities to better use its authorities synergistically and more efficiently harness the arsenal of democracy in support of our national security.

Notwithstanding the DPA's apparently vast authority, however, today's DPA is a shadow of its 1950 incarnation that contained seven titles and authorized dramatic dominion over civilian property and controls on the economy. The now extinct titles provided the power to requisition and condemn civilian property under title II,[12] stabilize prices and wages under title IV,[13] settle labor disputes under title V,[14] and control real

[10] Lockwood *supra* note 4 at 3 and Zeichner *supra* note 4 at 11.

[11] Manos *supra* note 9 at 1 (explaining how the title I priorities system works and discussing related case law); Alison Doyle, Partner, McKenna & Cuneo, L.L.P, *The Defense Production Act Of 1950*, CLIENT ALERT, *at* http://www.mckennacuneo.com/articles/article_detail.cfm?498 (Oct. 2, 2001) (last visited Mar. 19, 2002) (warning McKenna Cuneo clients to expect government contracts and explains the conditions for mandatory and optional acceptance in addition to mandatory rejection of a government priority order (also known as a "rated" order); Charles Tiefer, Professor, University of Baltimore Law School, *Practical Mind-Set Now Prevails for Government Contracting*, LEGAL TIMES at 36 (Oct. 21,. 2001) (discussing how the Sept. 11 attacks changed the tone of government contracting discussion from ideological wrangling to a pragmatic approach).

[12] 50 U.S.C.S. app. § 2081.

[13] *Id*. § 2101-2112.

[14] *Id*. § 2121-2137.

estate credit under title VI.[15] These far-reaching powers lapsed in 1953 and Congress never renewed them under the DPA.[16]

Even though it casts a smaller shadow than it did in 1950, the DPA's authorities are still substantial and still very necessary. Indeed, as recounted in the 2001 reauthorization hearings, "for more than fifty years, the DPA of 1950 … has enabled the President to ensure our nation's defense, civil emergency preparedness, and military readiness by providing "the statutory framework that … enable[s] the administration to meet future threats to our national security in light of a streamlined armed forces, a consolidated defense industrial base, and a globalized economy."[17] Most significantly, in support of reauthorization of the DPA in June of 2001, officials of the Departments of Defense,

---

[15] *Id*. § 2131.

[16] There is, however, an "urban legend" surrounding the DPA that President Nixon used it to enact wage and price controls in the 1970s. The most prominent promulgator of this legend is Sen. Phil Gramm, a longtime opponent of the DPA. News from the Senate Banking Committee, Senator Phil Gramm, Chairman, *Gramm Outlines Committee Agenda For The 107th Congress*, *at* http://banking.senate.gov/prel01/0122prcf.htm, 22 January 2001. In fact, President Nixon did institute wage and price controls, but his authority was the Economic Stabilization Act of 1970 (ESA) at 12 U.S.C. sec. 1904. Wage and price controls *within* the DPA in 1953 became extinct when congress allowed them to lapse and elected not to reauthorize them. H.R. Rep. No. 516 at 2 (1953).

The author is indebted to Mr. David Cumming, esteemed retired assistant counsel to the Federal Emergency Management Agency, for helping sort out the "urban legend" that President Nixon used the DPA to enact wage and price controls when, in actuality, President Nixon's controls emanated from the ESA of 1970. Telephone Interview, Mr. Cumming, Former Assistant General Counsel, Federal Emergency Management Agency (Mar. 2002) [hereinafter Cumming Interview].

[17] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2-7 (2001) (statement of Hon. Kenneth I. Juster, Under Secretary for Export Administration, Department of Commerce).

Commerce, Energy, and the Federal Emergency Management Agency (FEMA) noted the DPA provides authority for vital national security programs found nowhere else in law.[18]

This paper will provide an overview of the DPA with a focus on its historical basis, and its remaining titles, their applications, and the legal doctrines supporting them. Title I, Priorities and Allocations, allows the President to require contracts and orders critical for national defense to take priority over civilian contracts.[19] The Department of Commerce (DoC) implemented title I through the Defense Priorities and Allocations System (DPAS).[20] Another significant authority of the DPA is title III, "Expansion of Productive Capacity and Supply."[21] This title gives the President authority to use financial incentives and loan guarantees to expand the critical defense industrial base.[22] Although various agencies have been delegated responsibility for title III,[23] DoD is the only one significantly involved in implementing it.[24] Last but not least, title VII provides several disparate implementing authorities and an industrial base preservation authority.

---

[18] *Id.* (statements of Hon. David R. Oliver, Jr., Principal Deputy Under Secretary For Acquisition, Technology, and Logistics, Department of Defense; Hon. Kenneth I. Juster, Under Secretary for Export Administration, Department of Commerce; Hon. Eric J. Fygi, Deputy General Counsel, Department of Energy; and Michael D. Brown, General Counsel, Federal Emergency Management Agency).

[19] 50 U.S.C.S. app. § 2071-2178 (LEXIS 2001).

[20] Defense Priorities and Allocations System (DPAS). 15 C.F.R. pt. 700 (1998), *available at* http://www.bxa.doc.gov.

[21] 50 U.S.C.S. app. § 2091-2099a.

[22] *Id*.

[23] The president delegated authority for title III to a variety of agencies via Exec. Order No. 12,919, 59 F.R. 29525 (1994).

[24] DoD is the only agency with an active title III program. Department of Defense, *Defense Production Act, Title III Program Management*, *at* http://www.dtic.mil/dpatitle3/ (describing DoD's implementation of title III) (last visited Mar. 22nd 2002).

The industrial base preservation authority, known as Exon-Florio authority, permits the President to veto U.S. corporate mergers and acquisitions by foreign companies when national security is threatened.[25] However, other than noting that it is intended to preserve the industrial base, a thorough analysis of Exon-Florio is beyond the scope of this paper. Additionally, title VII contains a liability immunity provision for entities complying with DPA directives.[26] This immunity provision, softens the impact of title I government priority orders on contractors who are forced to set aside or delay work promised to commercial customers and is discussed later.[27]

By examining the broad scope of the DPA, the acquisition community will be able to synergistically employ its authorities to maximize civilian industry's contribution to national security.

II. Background – Original Enactment and Historical Use

President Harry S. Truman provided the impetus for the DPA on the eve of the Korean Conflict when he asked Congress to provide economic tools to mobilize U.S. productive capacity.[28] The congress offered up the DPA on a limited basis in the sense

[25] 50 U.S.C.S. app. § 2170-2170a; *See also* David A. Menard, *The Flexibility of theExon-Florio Amendment and the Expansion of Telecommunications Into the Global Economy*, 31 PUB. CONT. L. J. 313 (2002)(providing an overview of Exon-Florio authority).

[26] *Id*. § 2157.

[27] *See infra* Part III. C. 3.

[28] H.R. REP NO. 107-173, at 2 (2001).

that it had a three-year lifespan[29] but reauthorized it with only slight variations every two to three years since.[30] Over time, the focus shifted from the 1950s' requirements for raw materials to build tanks and planes to the still prevailing 1990s' requirements for high technology materials, products and services.[31] Additionally, the DPA has acquired a focus on stemming the decline of certain domestic industries.[32]

In its current form, it facilitates, supply and timely delivery of products, materials, and services to military and civilian agencies, as needed, in the interests of national defense.[33] To put the DPA's scope of powers in context, it is instructive to note that even at its zenith in 1950, the DPA was generally viewed as less authority than the executive branch had in World War Two but, nonetheless, one to be exercised sparingly.[34]

Finally, reflecting Americans' eternal optimism, Congress placed the DPA, a law placing our civilian industry in a war-ready posture, in title 50's appendix, a place where only "laws of a temporary and emergency nature relating to war and national defense"

---

[29] 50 U.S.C.S. app. § 2166 (listing the DPA's expirations and reauthorizations).

[30] *Id*. The most significant changes occurred when titles II, IV, V, and VI were allowed to lapse in 1953. *See also Defense Production Act Amendments of 1953*, H.R. REP. NO. 516, at 2 (1953).

[31] 50 U.S.C.S. app. § 2062(a) provides that the "vitality of the industrial and *technology* base … is a foundation of national security" (emphasis added). The "history" section of this code service section notes that Congress added the word "technology" and related changes in the 1992 reauthorization of the DPA. Telephone Interviews with Mr. Rick Meyers, Program Manager, Defense Priorities and Allocation System (DPAS), Bureau of Export Administration, Department of Commerce (Nov. 2001 to Mar. 2002)[hereinafter Meyers Interviews].

[32] Lockwood *supra* note 4 at 1

[33] *Id*.

[34] Alfred. L. Scanlan, *The Defense Production Act of 1950*, 5 RUTGERS L. REV. 518 (1951) (providing an overview of the DPA following enactment and cautioning government agencies to use it sparingly).

reside.[35] Even though the DPA has resided in this temporary volume for over 50 years, its placement there reminds us that we strive for the day we live in a less threatening world.

A. President Truman's Vision

President Truman demonstrated near-prophetic vision in charging Congress to enact defense production legislation in the midst of Korean Conflict mobilization *and* on the cusp of the Cold War. As if he was able to anticipate the fifty-year stalemate with the Soviet Union and concomitant battle of logisticians gathering war materiel,[36] he asked for war production legislation that expressly recognized the importance of the civilian economy to the fight. Specifically, on July 19, 1950, reporting on the "situation in Korea," President Truman proclaimed "The free world has made it clear, through the United Nations, that lawless aggression will be met with force."[37] Accordingly, he outlined the government's duty as follows:

> A primary duty of the government is *to provide for the common defense.* In fulfilling this responsibility, *the test is not how far we can go without placing strain upon the domestic economy* or without creating inflationary pressures. We must go as far as changing circumstances may require. In

[35] 50 U.S.C.A. app. V (WEST 2000).

[36] DAVID W. HOGAN, JR., 225 YEARS OF SERVICE, THE U.S. ARMY, 1775-2000 at 30 (2000) (noting substantial material and technology requirements of the Cold War and also mutually beneficial overlap between previously segregated military and civilian industrial requirements), *available at* http://www.army.mil/cmh-pg/books/225/.

[37] H.R. REP. NO. 2759 (1950), *reprinted in* 1950 U.S.C.C.A.N. 14234 (1950).

> the final analysis, there are no limits except our total strength to guide us in our determination to resist aggression and thus to strive for peace.[38]

Revealingly, President Truman stated the obvious fact that the war effort was more important than the measure of strain on the domestic economy. The fact that stresses on the economy are even considered in this context betrays the fact that the Korean Conflict did not enjoy the support that World War Two enjoyed.[39] Is this because the U.S. was devoting significant resources and troops to a conflict where neither U.S. safety nor economic interests appeared to be directly threatened? Is it because the awesome power of nuclear weapons gave the U.S. the apparent luxury to fight large-scale wars with less impact on the civilian economy than previously? Probably the truest answer is that Truman foresaw that in the looming Cold War, there could be no national security without economic viability. Indeed, the President recognized that economic strength would be a linchpin of national security.

Accordingly, President Truman laid the groundwork not just for mobilizing for the Korean War but for civilian industrial support of the deterrence posture used to fight and win the Cold War in saying:

> The question remains as to how much of our total economic strength must be shifted from peacetime production to defense purposes in the current situation…I have recommended to the Congress the substantially increased programs which should now be undertaken to resist aggression

[38] *Id*. (emphasis added).

[39] Alfred L. Scanlan, *The Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185, at 221 (1951) (discussing the import of the public perceiving that its DPA induced sacrifice is related to some threat to its security).

> and further to build up our preparedness. … These changes take us in the right direction at once. And if the situation should become even more serious later on, *the measures which I now propose for the current situation are also the measures which would make us more ready for further steps*.[40]

Congress answered Truman's call. Acknowledging that while the nation enjoyed unprecedented industrial and economic strength, fears of war-induced shortages at the outset of the Korean Conflict had caused shortages of materials and inflationary economic pressures.[41] Consequently, Congress undertook to allay the fears causing panic buying and, at the same time, to discipline those who would try to take advantage of that fear.[42] Accordingly, the DPA's economic controls would reinforce confidence in the business sector's ability to cope with war production and its anti-hoarding provisions would discourage profiteers. In the long-term, however, the DPA would incorporate two critical concepts that continue in the modern DPA; first, to immediately channel needed materials into production for the national defense[43] and second, to encourage increased production of certain critical materials needed to support national defense in the future.[44]

The acquisition community should take note that even at the DPA's inception in 1950, Congress acknowledged competition as a key component of our defense industrial

---

[40] H.R. REP. NO. 2759 at 3621 (emphasis added).

[41] *Id*. at 3623.

[42] *Id*.

[43] *Id*.

[44] *Id* at 3627.

might.[45] Indeed, Congress exhorted government agencies to use restraint in applying the DPA authorities for the sake of the American economy. Specifically, in the "Declaration of Policy" in 1950, Congress stated that the President should endeavor to prevent "undue strains and dislocation upon wages prices, and production or distribution of materials for civilian use, *within the framework,* as far as practicable, *of the American system of competitive enterprise.*"[46] Thus, Congress announced its confidence that the fruits of competitive enterprise borne of the American system will, most of the time, produce better products for the national defense than a command and control authoritarian process.

Commentators debated the various implications of this sweeping legislation at first.[47] However, after congress allowed the more expansive titles to lapse in 1953, very little controversy surrounded the DPA[48] until Presidents Clinton and G. W. Bush invoked its emergency authorities under title I to ensure delivery of natural gas to California in January and February of 2001.[49] Pundits said the DPA was intended to be used only for military exigencies rather than various and sundry peacetime emergencies.[50] Such

---

[45] H.R. REP. NO. 9176 at 859, 81st Cong. (1950).

[46] *Id.* (emphasis added).

[47] *See* sources cited *supra* note 3.

[48] In fact, a search of the Index to Legal Periodicals and LEXIS revealed no new law review articles reviewing the entire DPA after 1952.

[49] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2-7 (2001) (statement of Hon. Eric J. Fygi, Deputy General Counsel, Department of Energy); CBS News – National, *Natural Gas Crisis…Or War?,at* http://www.cbsnews.com/stories/2001/02/09/national/main270861.shtml (last visited Mar. 11, 2002).

[50] *Id.*

thinking is shallow in that it fails to recognize that a plethora of different types of emergency situations like energy crises and natural disasters can threaten national security by making us appear weak to our enemies.[51]

Overall, there is little doubt but that President Truman and Congress were ahead of their time when they crafted the DPA. Indeed, commentators today continue to trumpet its utility in both responding to and preparing for attacks on our increasingly interrelated critical infrastructure such as computer networks[52]

B. Gulf War Lapse

A startling DPA story emanates from the Gulf War of 1990 and 1991. The DPA's automatic termination provision and Congress' failure to reauthorize the DPA caused the entire DPA to lapse on September 30th, 1990 – smack in the middle of the Gulf War mobilization.[53] This was incorrectly characterized during the 2001 reauthorization hearings as "an unfortunate but brief occurrence."[54] In fact, the Congress did not get around to reauthorizing the DPA until the Gulf War was over, on August 17th, 1991![55]

---

[51] Zeichner *supra* note 4 at 1 (noting the DPA is a "powerful legislative tool for managing critical infrastructure service failures).

[52] THE PRESIDENT'S COMM'N ON CRITICAL INFRASTRUCTURE PROTECTION, MAJOR FEDERAL LEGISLATION, A "LEGAL FOUNDATIONS" STUDY, REP. 6 OF 12 at 2(1997), http://www.ciao.gov/PCCIP/lf06.pdf (last visited Mar. 19, 2002).

[53] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 1 (2001) (statement of Committee Chairman Peter King).

[54] *Id*.

[55] 50 U.S.C.S § 2166 (LEXIS 2001); Cumming Interview.

So how did we make it through the Gulf War without the "vital authority"[56] of the DPA? Two factors combined to make this possible: First, George H. W. Bush was able to extend priority and allocation authority through Executive Order 12742.[57] Secondly, critical shortages did not severely affect the United States mobilization because the Cold War stockpiles were large enough that no significant tension developed between military and consumer needs.[58] The lesson taken from this episode should not be that executive authority can easily replace the title I authorities. Instead we should recognize that the country benefited from the short duration of the war and the huge Cold War stockpiles that equipped our fighting forces – and we should not gamble with our national security by going without the DPA authority again.

The above described lapse touches on an important concept justifying continued renewal of the DPA's priority and allocation authority – that it is most critically required when the public is not quite ready to make voluntary sacrifices for a particular defense need. Our commander in chief must have it to act in our defense even at times when the public will is not quite ready to sacrifice butter for guns in proportion to an arising threat to our national security.[59] President Truman implied this when he asked for the authority and Congressman Peter King reiterated this prophetically during the 2001 reauthorization

---

[56] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 1 (2001) (statement of Mr. Juster).

[57] Exec. Order No 12,742, 56 Fed. Reg. No. 1079 (Jan. 10, 1991). The title of the order is *National Security Industrial Responsiveness*; Cumming Interview.

[58] John T. Correll and Colleen A. Nash, *The Industrial Base At War*, AIR FORCE MAGAZINE (Dec. 1991).

[59] Alfred L. Scanlan, *The Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185, at 221 (1951).

hearing when he said of the 1990 lapse, "[f]ortunately, we do not seem to be in that situation now, but geopolitical situations can change rather quickly. Also, civil emergencies are particularly hard to predict."[60] Obviously, the Al Quaeda attacks of September 11, 2001 on New York and the Pentagon and the ensuing mobilization and war dramatically illustrated Congressman King's point.

Unfortunately, the Al Quaeda attack was so devastating that there it provided plenty of public support for the war effort[61] at present. Certainly, it would have been preferable if we could have mobilized and struck the enemy without suffering the devastating losses of September 11th, 2001. In any event, we have the DPA now[62] and are likely in a situation that will justify its continual reauthorization until the world situation changes dramatically.

C. Procurements – 1950 – 2001

The DPA's contribution to the nation's security is substantial. Specifically, "[t]he DPA provided vital support to the United States military in every conflict since it was enacted."[63] For example, during the 1950s, the advent of military jet aircraft made expansion of existing titanium facilities at government expense "well nigh mandatory"

---

[60] *2001 Reauthorization Hearings* at 2 (Mr. King's statement).

[61] James Dao, *Pentagon Seeking a Large Increase in its Next Budget*, NEW YORK TIMES, Jan. 6, 2002, at 1.

[62] 50 U.S.C.S. § 2166 (LEXIS 2001) (reauthorizing the DPA until Sept. 30, 2003).

[63] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 1 (2001) (statement of Committee Chairman Peter King).

because of the valuable metal's importance in the manufacture of high performance jet airframes and jet engines.[64] At the time, commercial airplanes used piston engines and did not require titanium but military aircraft, then being developed, needed greater quantities than were available in the commercial marketplace. Therefore, it was in the government's interest to underwrite expansion of the titanium production industry to increase competition among potential government suppliers. The DPA came to the rescue when under title III the government concluded eleven separate purchase agreements with domestic producers of titanium.[65] These agreements enabled significant expansion of the defense industrial base for this militarily necessary commodity.[66]

Title III was also used to expand domestic manganese mining in the 1950s. Domestic production of this metal[67] was very limited. It is important to iron and steel production because it has essential sulfur-fixing, deoxidizing, and alloying properties.[68] Therefore, the government sought to increase domestic production through use of the title III purchase program.[69] The government was able to expand domestic mining by promising

---

[64] Henry A. Carey, Jr., Edwin D. Hicks, J. Pierre Kolisch and Joseph Schulein v. United States, 326 F. 2d 975; 977 (Ct. of Fed. Claims 1964) (deciding that royalties should be awarded to the patent holder for the titanium manufacturing process).

[65] *Id*.

[66] Department of Defense, *Defense Production Act, Title III Program History, at* http://www.dtic.mil/dpatitle3/ (noting that title III was used to create a domestic titanium industry "from scratch") (last visited Mar. 22, 2002).

[67] Albert W. Himfar v. U.S., 355 F.2d 606; 174 Ct. Cl. 209 (1966)(holding that a government agency's improper revocation of a contractor's right to participate in a DPA ore purchase constituted a compensable breach of contract where it caused the contractor to go bankrupt).

[68] United States Geological Survey, *Manganese Statistical Compendium*, *at* http://minerals.usgs.gov/minerals/pubs/commodity/manganese/stat/ (last visited Mar. 19, 2002).

[69] *Himfar* at 606.

to purchase certain minimum amounts at a price above the market-price for foreign manganese. This was done to ensure a continuous supply in the event foreign suppliers became unreliable in time of conflict.[70]

In addition to title III industrial base expansion projects, title I's priority ordering authority played a valuable role in the 1950s. One interesting case even demonstrated the DPA's utility in prioritizing needs among government agencies. Specifically, DoD used a priority contract to speed up installation of intercontinental ballistic missile silo elevators by a company named Elser.[71] Unfortunately, this priority contract prevented Elser from timely completing work on elevators in a Department of Veterans' Affairs (VA) building. Consequently, the VA sought to penalize Elser according to a liquidated damages provision of its nonrated contract. Apparently either Elser did not tell the VA that the priority order caused the delay or the VA contracting officer was unaware that the DPA forbids penalties caused by compliance with a priority order.[72] In any event, the VA Board of Contract Appeals ordered the VA to withdraw the liquidated damages assessment caused by Elser's compliance with the DoD's priority order for missile silo elevators. This case is an anomaly in the sense that a government agency will recognize and respect the DPA's immunity section for delays caused by rated orders without resort to an adversary proceeding.

---

[70] *Id*.

[71] Appeal of Elser Elevator Company, Appeals Case No. 298, VA BCA LEXIS 125 (1960).

[72] 50 U.S.C.S. app. § 2157 (LEXIS 2001).

In the 1960s, the government used title I again to issue rated orders to several chemical manufacturers for the production of Agent Orange defoliant for the Viet Nam War. Unfortunately, this chemical allegedly caused serious health problems to users and became the subject of liability indemnification litigation.[73] Ultimately, the DPA immunity provision[74] was interpreted to provide immunity only "in the event that [a] DPA contractor is forced to breach another contract to fulfill the government's requirements"[75] rather than automatic indemnification for a product liability claim. This fact would be troubling if not for the existence, outside of the DPA, of the "government contractor defense."[76] This defense does not provide automatic indemnification for the manufacturer of a defective product provided to the government as sought by the plaintiff manufacturers. Rather, it could afford a contractor complying with government specifications the benefits of the government's sovereignty *if* the government's specifications were the cause of harm.[77] The good news for the DPA's viability is that the rating was irrelevant to the product liability determination in the case.

[73] Hercules Incorporated, et. al., Petitioners v. United States, 516 U.S. 417 (1996).

[74] 50 U.S.C.S. app. § 2157.

[75] Hercules Incorporated, et. al. Petitioners v. United States, 24 F. 3d 188 (1994).

[76] United States v. Boyle, 487 U.S. 500 at 512 (1988) provides that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." This current state of the "Government Contractor Defense" is well described in "*The Government Contractor Defense" Upheld as Court Rejects OTS Limitation Urged by Plaintiffs*, 44 GOVT. CONTRACTOR at 4 (Feb. 6, 2002).

[77] For an excellent overview of the immunity provision of the DPA, *see* source cited *supra* note 9 at 14-7.

In another case arising out of the Viet Nam War, the government invoked the immunity from breach of contract damages provision of the DPA by informal "jawboning."[78] Government contractors informally convinced McDonnell Douglas Aircraft Corporation and its suppliers to prioritize military orders for Viet Nam ahead of commercial orders. This delayed production of a large number of passenger jets ordered by Eastern Airlines. Late delivery put McDonnell Douglas in breach of its contract with Eastern, which incurred over $20,000,000 in damages when it was forced to fill its requirements from another source.[79] In this instance, government's informal invocation of the needs of the war effort were found to effectively invoke the immunity from breach of contract provision of the DPA. Accordingly, Eastern could not obtain damages from McDonnell Douglas incurred as a result of DPA induced delays in production.[80]

In the early 1980s, the United States was held not liable for a contractor that lost a business opportunity because of a DPA induced delivery delay.[81] Lockheed California, an aircraft manufacturer, obtained a DPA authorized priority preference for a complicated manufacturing device built by its subcontractor, Kearney and Trecker Corporation. The

---

[78] Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F. 2d 957, 964 (5th Cir. 1976) (calling government's informal requests for the aviation industry to give military projects priority ahead of civilian production during the Viet Nam War without formally invoking the DPA "jawboning").

[79] *Id*. at 965.

[80] *Id*. at 995 (providing that McDonnell's good faith in complying with the Government's demands for priority and uncontroverted evidence of the entire aviation industry's acceptance of the policy that, as a matter of law that McDonnell was not liable for any delivery delay proximately resulting from the informal procurement program consisting of government "jawboning" suppliers in order to obtain priority for military equipment required for the Viet Nam War).

[81] Kearney & Trecker Corp. v. U.S., 688 F. 2d 780 at 783; 231 Ct. Cl. 571 at 578 (1982) (deciding that the loss of an equipment sale caused by a DPA priority did not constitute a compensable government taking under the 5th Amendment to the U.S. Constitution).

device, a "moduline," took two years to build. Without priority contracting authority, Lockheed would have had to wait two years from order to delivery. Using its government authorized priority; Lockheed bought an almost-complete moduline previously ordered by Rolls Royce Corporation for a commercial application. Faced with an almost two-year additional wait for its moduline, Rolls Royce cancelled its order. Kearney and Trecker then sued the United States alleging that the priority rating perpetrated a compensable taking under the Constitution. The Court of Claims denied the taking claim holding that the DPA caused only "the mere frustration of a contract resulting from the government's exercise of its power of eminent domain," rather than a "taking" for which compensation must be awarded.[82] This landmark case defined the legal status of priority contracting induced hardships in the government's favor.

In the late 1980's, title I came to the government's rescue again when an explosion at one of the nation's two ammonium perchlorate plants jeopardized the government's access to an indispensable rocket fuel component. The government used Title I's allocation authority to apportion the limited remaining supply of ammonium perchlorate among commercial and government consumers until additional suppliers could start production.[83]

---

[82] *Id.* at 783 *interpreting* Omnia Commercial Co. v. United States, 261 U.S. 502 at 510-511(1923).

[83] *Defense Production Act: Hearing Before the Senate Banking Committee*, 100th Congr. at 7 (1989), LEXIS, Nexis Library, Congressional Universe (comments of Robert Costello, Former Undersecretary of Defense); Steven R. Linke, *Managing Crises in the Defense Industry: The Pepcon and Avtex Cases*, McNair Papers, No. 9, Institute for National and Strategic Studies, (First Printing, July, 1990; Second Printing, Nov. 1996) (describing the cumbersome presidential, interagency, and congressional coordination process required to use the DPA to relieve critical shortages of rocket fuel and rocket engine production in the late 1980s) *at* http://www.ndu.edu/inss/macnair/mcnair09/mcnair09.pdf (last visited Mar. 19, 2002).

During the Gulf War, despite the fact that it was only authorized by the President's executive authority,[84] priority rating authority was used to great effect to procure items as diverse as computers and communication equipment, satellite-based mapping systems and materials to help protect troops against chemical weapons.[85]

In the last decade, title I's authority as implemented in the DoC's DPAS served to set priorities for scarce resource requirements among military departments and to timely provide American defense materiel to our allies. For example, the DoD used the DPA as authority to evaluate and modify production resource shortfalls and delivery conflicts of transparent bubble canopies for F-22, F-18A/B/C/D, and F-18E/F aircraft. Additionally, when German and Belgian Air Forces had trouble obtaining global positioning system navigational processors from a manufacturer in a timely manner adversely impacting pilot training, the DoD and DoC stepped in and applied DPAS priority authority to enable the contracts to be filled in advance of lesser priority U.S. orders. Finally, when the United Kingdom (U.K.) experienced delays in receiving critical identification friend or foe transponders for U.K. WAH-64 Apache helicopters, DoD and DoC authorized use of a priority rating to permit the manufacturer to ship the transponders much sooner than would have been otherwise possible.[86]

---

[84] *See infra* Part II. B.

[85] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2 (2001) (statement of Committee Chairman Peter King).

[86] *Id.* at 14 (statement of Hon. David Oliver).

Since 1995, the government used the DPAS to support U.S. and allied peacetime and wartime defense requirements on more than 100 occasions.[87] Sixty eight percent of all cases supported wartime requirements – fifty percent Bosnia and eighteen percent Kosovo.[88] Procurements assisted by the DPAS included communications equipment, Joint Direct Attack Munitions (JDAMs), and computer equipment for North Atlantic Treaty Organization (NATO) command and control infrastructure. Thirty seven percent of the cases supported U.S. defense requirements, forty seven percent supported the NATO, nine percent the U.K., and three percent supported Canada, and two cases for Israel, and one case each for Japan and Germany.[89]

Undoubtedly, the government used DPA authority to maintain our defense posture through the Cold War and every significant military operation since its inception. Through judicious use of title I, urgent needs were consistently met. Through carefully planned use of title III, we addressed long-term materiel deficiencies and developed fledgling domestic capabilities. Overall, the DPA has been a critical linchpin in our ability to respond to threats to our security including those where our allies are part of the web of security protecting freedom worldwide.

D. 2001 Reauthorization Rationale

[87] *Id.*

[88] *Id.*

[89] *Id*. at 14-15.

In hearings during the Summer of 2001, Congress considered whether to reauthorize the DPA.[90] Ultimately, noting that the industrial and technology base of the United States is a foundation of national security, Congress provided the President a vast array of authorities to shape defense preparedness.[91] The authorities expressly transcend peace, crisis, and war because "in peacetime, the health of the industrial and technological base contributes to the superiority of United States equipment, and in time of crisis, a healthy industrial base will be able to effectively meet the demands of an emergency."[92]

Ultimately, Congress justified reauthorization of the DPA as follows: Continuing international problems including reliance on imports and production lead times requires development of preparedness programs, domestic defense industrial base improvement, provisions for graduated response to threats, expansion of domestic production capacity, and some diversion of materials and facilities from civilian to military and related purposes.[93] Thus, the threats requiring this standby authority in President Truman's time continue to this day.

III. The DPA In 2002 -- Applying its "Array of Authorities"[94]

[90] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2 (2001).

[91] 50 U.S.C.S. app. § 2062(a)(1) (LEXIS 2001).

[92] *Id*. § 2062(a)(2-3).

[93] *Id*. § 2062(a)(4)(A-E).

[94] *Id*. § 2062(a)(5).

Today's DPA authority retains two basic thrusts, command and control over specific items and services under title I and industrial base expansion and maintenance measures under title III and VII, respectively. Voluntary industrial base expansion authorities reside in title III's economic incentives.[95] Involuntary defensive measures reside in title VII's Exon-Florio prohibition on acquisitions of critical U.S. industries that may threaten national security.[96]

Despite the inference given by the "array of authorities" phrase in the DPA's "Declaration of Policy,"[97] the depth and breadth of its potential impact is scaled back significantly since inception in 1950 version. As mentioned previously, most of the reduction occurred in 1953 when four of the original seven titles were rescinded. The extinct powers to requisition and condemn civilian property under title II,[98] stabilize prices and wages under title IV,[99] settle labor disputes under title V,[100] and control real estate credit under title VI[101] gave the 1950 incarnation of the DPA a direct reach into the life of almost every citizen. This made the DPA too likely to intrude unnecessarily into the civilian marketplace where it was hoped that market forces could provide for defense needs without intervention. The remaining power to improve the industrial base's

---

[95] *Id*. § 2091-2099.

[96] *See* sources cited *supra* note 25.

[97] 50 U.S.C.S. app. § 2062(a)(5).

[98] *Id.* § 2081.

[99] *Id*. § 2101-2112.

[100] *Id*. § 2121-2137.

[101] *Id*. § 2131.

defense capabilities through judicious use of priorities, allocations, and incentives seem more in accord with the DPA's original mandate to provide for national security needs "within the framework, as much as possible, [of] the American system of competitive enterprise" – a minimalist approach to federal intervention.[102]

The most controversial DPA authority is the title I authorized DPAS that grants federal agencies, contractors, and subcontractors the legal power to require private companies to place certain orders ahead of others. The goods or services are paid for at ordinary market prices but the DPAS does not compensate parties for inconvenience or delay suffered when a commercial order is delayed because of a priority government order.[103] How does this work? What's the precise legal authority for this? How have government agencies systematized and executed this authority? Does it work well? Have unforeseen legal issues historically cropped up after the goods or services are delivered? What are they? The next subsection will undertake to answer these questions.

Title III authorizes the President to use various financial incentives to "develop, maintain, modernize, and expand the productive capacities of domestic sources for critical components, critical technology items, and industrial resources essential for the execution of the national security strategy of the United States."[104] However, he may only use the authority in cases where domestic sources would best serve national security

---

[102] H.R. REP. NO. 9176 at 859, 81st Cong. (1950).

[103] *See generally* 15 C.F.R. pt. 700 (1998).

[104] 50 U.S.C.S. app. § 2077(a).

but are not available.[105] The President's responsibilities in title III are carried out via a complex system of interagency checks and balances via delegations and assignments of responsibility in Executive Order 12,919.[106] However, the DoD controls the purse strings, and effectively, the program because it is the fund manager for the title III account.[107] Is this the right construct to deal with the current attacks on civilian targets in the United States? It is hard to say but the fact that there is significant congressional oversight of the title III program ensures that the issue will receive a high degree of scrutiny.[108]

Finally, title VII gives the President the power under the Exon-Florio Amendment to "suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses if such action threatens national security."[109] Additionally, entities controlled by foreign governments can be likewise prohibited from acquiring DoD contractors engaged in significant defense projects.[110] As noted earlier, a thorough analysis of this authority is beyond the scope of this paper. Nevertheless, in keeping with Truman and Congress'

---

[105] *Id*. § 2091-2099.

[106] Exec. Order No. 12,919, 59 F.R. 29525 (1994).

[107] *Id*. § 309. The Secretary of Defense is designated the Defense Production Act Fund Manager, in accordance with § 304(f) of the Act, and shall carry out the duties specified in that section, in consultation with the agency heads having approved Title III projects and appropriated Title III funds.

[108] According to the official DoD website at Department of Defense, *Defense Production Act, Title III History*, *at* http://www.dtic.mil/dpatitle3/, (last visited Mar. 22, 2002) the 1950 title III program had almost unlimited authorities to encourage private investment in materials production and supply but today's program is subject to a significant restrictions to ensure that government action is needed and that title III authorities are the best means to meet the need. Significant oversight comes from the fact that proposed title III actions are subject to prior review by Congress.

[109] *See* sources cited *supra* note 25.

[110] 50 U.S.C.S. app. § 2171.

original vision for the DPA, it should be used very sparingly because it intrudes directly into the civilian economy.

A. Title I – Priority in Contracts and Orders[111]

Generally, title I authorizes the priority of certain government contracts ahead of other contracts and allocation of designated scarce critical materials.[112] Additionally, it forbids hoarding of designated materials[113] and contains a criminal sanction provision.[114] Title I also contains provisions for strengthening domestic capability in support of title III[115] and, finally, a "strong preference for small business concerns which are subcontractors or suppliers."[116]

The "Priority in Contracts and Orders" section[117] gives the President the aforementioned power to require priority performance of designated contracts. It is limited to contracts other than employment which he deems necessary to promote the national defense. Additionally, as the DoC interprets this authority, a contractor performing a priority order may be required to issue a priority order to its

---

[111] *Id*.

[112] *Id*.

[113] *Id*. § 2072.

[114] *Id*. § 2073.

[115] *Id*. § 2077.

[116] *Id*. § 2078.

[117] *Id*. § 2071.

subcontractors.[118] This gives the prime contractor the "extremely useful" ability to flow down his own priority privilege and its associated immunity against breach of contract claims caused by a priority order to those subcontractors performing work to fill the prime's priority government contract.[119] In addition to the priority power, this section provides the President authority to allocate materials, services, and facilities in such a manner, upon such conditions, and to such extent he deems necessary or appropriate to the national defense.[120] Finally, the DPA prohibits recipients of title I contracts or orders from discriminating against the government by charging a higher price than they would if the order were not compulsory, or price gouging.[121]

1. Priority and Allocations Authority Delegation

By far, the most prominent feature of today's DPA in the war on terrorism is title I's contract priority authority[122] that authorizes the President to require private companies to perform contracts for goods, services, or facilities[123] under the government's terms[124] to

[118] 15 C.F.R. pt. 700 (1998).

[119] Presentation by John T. Jones, Jr. to the 2001 Contract Law Symposium, 6 Dec 01, The Army Judge Advocate General's School (TJAGSA), Charlottesville, Virginia. Mr. Jones agreed to waive the TJAGSA non-attribution policy to permit the author to present his ideas in this paper.

[120] 50 U.S.C.S. app. § 2071(a).

[121] *Id*. § 2157. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this act … or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

[122] *See* sources cited *supra* notes 9, 11, and accompanying text.

[123] 50 U.S.C.S. app. § 2062(a)(5).

[124] *Id*. § 2071(a).

the extent he deems "necessary to promote the national defense."[125] Because it authorizes the government to *require* businesses to accept and provide priority to government contracts, it has garnered significantly more negative attention than the more benign authority to take steps to enhance the industrial base provided by title III.[126] Additionally, the title I authority has more teeth than the title III authority. This is because the DoC has specific authority and responsibility to administer the DPAS through Executive Order 12919[127] and because non-compliance risks criminal sanctions.[128]

As mentioned previously, the President has delegated authority for making these findings and implementing the DPA to various agencies of the government via Executive Order 12919.[129] Under the order, the National Security Council is designated as the "principal forum for consideration and resolution of national security resource preparedness policy."[130] Additionally, the FEMA Director is the primary advisor to the

[125] *Id*. § 2071(a)(2).

[126] *See* sources cited *supra* notes 9, 11, and accompanying text.

[127] Exec. Order No. 12,919, 59 F.R. 29525 (1994). *See also* National Defense Industrial Resources Preparedness and Defense Priorities and Allocations System, 15 C.F.R. pt. 700 (1998), Revised Edition. Available at http://www.bxa.doc.gov (last visited Feb. 9, 2002).

[128] 50 U.S.C.S. app. § 2073.

[129] Exec. Order No. 12,919.

[130] *Id*. § 104.

National Security Council on the issue of DPA policy and is further directed to coordinate its incidental plans and programs.[131]

There is a surprising twist in the President's delegations. Generally, the President delegated priority authority to agencies according to their area of responsibility. For example, the Secretary of Agriculture is responsible for food resources, the Secretary of Energy for energy, the Secretary of Health and Human Services for health resources, and the Secretary of Transportation for civil transportation.[132] The surprising part is that the DoD is responsible for priority contracts with respect to *water* resources[133] while the DoC has ultimate dominion *all other* materials, services and facilities.[134] There is nothing in the Executive Order that explains why DoC has dominion over all materials including defense materials while DoD has complete authority over water. However, it stands to reason that it is because the Army Corps of Engineers is best positioned among federal entities to make informed decisions about water.[135] Additionally, the DoC is best situated among federal agencies to balance the priority of defense related needs of DoD against federal and commercial requirements.[136]

---

[131] *Id.*

[132] *Id*. § 201(a)(1)-(4).

[133] *Id*. § 201(a)(5).

[134] *Id*. § 102(a)(6).

[135] The Army Corps of Engineers Mission Statement lists as a goal "Creating synergy between water resources development and environment." Army Corps of Engineers Website *at* http://www.hq.usace.army.mil/cepa/vision/vision.htm (last visited Mar. 20, 2002).

[136] Meyers Interviews.

The lion's share of the bureaucratic work of the DPA is delegated to the DoC. Accordingly, the DoC implemented the DPAS in consultation with relevant agencies. The DoC redelegated authority for rating all contracts for materials, services, and facilities needed in support of designated programs to the agency with determination authority over the program at issue. For example, the DoD has authority to issue rated orders regarding combat aircraft and FEMA can make orders for emergency supplies.[137]

The energy priority process has an interesting combination of delegations. Specifically, the DoC shares a part of the energy related decision process with the Department of Energy (DoE). The DoE must determine when a material, service, or facility is "critical and essential" and the DoC must make determine when it is "scarce"[138] Thus is laid out the "energy kabuki dance"[139] where the DoE and DoC must agree on the approach before the government may allocate or require contract priority for energy.[140] Of course, since these are the President's authorities, he could always do as Presidents Clinton and G. W. Bush did to relieve California's 2001 energy crisis and make the

[137] 15 C.F.R. pt. 700 at A-35.

[138] Exec. Order No. 12,919 § 101(c). According to 15 C.F.R. pt. 700 at A-18 (1998), "scarcity" implies an unusual difficulty in obtaining the material, equipment, or services in a time frame consistent with the timely completion of the energy project. Among the factors to be used in making the scarcity finding will be the following: (i) Value and volume of material or equipment shipments; (ii) Consumption of material and equipment; (iii) Volume and market trends of imports and exports; (iv) Domestic and foreign sources of supply; (v) Normal levels of inventories; (vi) Rates of capacity utilization; (vii) Volume of new orders; and (viii) Lead times for new orders.

[139] Kabuki is a traditional Japanese popular drama performed with highly stylized singing and dancing. Merriam Webster's Collegiate Dictionary (2002), *at* http://www.m-w.com/cgi-bin/dictionary.

[140] 50 U.S.C.S. app. § 2071(c) as delegated by Exec. Order No. 12,919 § 202, 59 F.R. 29525 (1994).

determinations personally.[141] This is actually true of all of the delegated authorities but, fortunately, the DPAS's delegation of authority to responsible agencies by way of preapproved program designations saves agencies from the multi-agency findings kabuki dance in most cases.[142]

2. What is a DPAS "Rated Order?"

A DPAS "rated order" is an order placed under the authority of DoC's DPAS program to obtain preferential acceptance and performance of contracts or orders supporting approved national defense and energy programs.[143] The DPAS's goals are: (1) to assure the "timely availability" of industrial resources to meet "current national defense and emergency preparedness program requirements;" and (2) to provide an "operating system" to support rapid industrial response in a national emergency.[144]

More specifically, a rated order is a prime contract, subcontract, or purchase order issued in support of an approved national defense or energy program that, under the DPAS, requires preferential treatment over "unrated" orders. An "unrated" order is a commercial order or an unrated government order.[145] To qualify as a "rated" order, an

---

[141] *Reauthorization of the Defense Production Act of 1950: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth*, 107th Cong. 2-7 at 32 (2001) (statement of Hon. Eric J. Fygi, Deputy General Counsel, Department of Energy)(27 June 2001).

[142] Meyers Interviews.

[143] 15 C.F.R pt. 700 at iii. (1998).

[144] *Id*.

[145] *Id.* pt. 700 at B-4.

order must comply with specific DPAS requirements. Namely, it must have (1) a priority rating derived from the DPAS regulation, (2) a required delivery date(s), (3) a signature or name of a person authorized to issue the order, and (4) a statement that "This is a rated order certified for national defense use, and you are required to follow all the provisions of the DPAS regulation (15 C.F.R. 700)."[146] More specific guidance is contained in the DPAS regulation.

The DPAS regulation contains a listing of programs that are pre-approved for priority performance.[147] Because they are pre-approved, the agencies listed in the regulation may issue rated orders for requirements of these programs without consulting with DoC. This listing indicates the pre-approved programs and the agencies authorized to issue rated contracts in support of those programs. For example, DoD may issue rated orders for aircraft, missiles, ships, tanks, weapons, ammunition, electronic and communications equipment, military building supplies, production equipment (both government owned and contractor owned), combat rations, construction, maintenance, repair, and operating supplies.[148] The DoC reserves the authority to issue rated orders on behalf of foreign military and atomic energy programs. Additionally, the General Services Administration may issue rated orders for federal supply items, and FEMA for emergency preparedness activities.[149]

---

[146] *Id*.

[147] *Id* at A-35-37.

[148] *Id.* at A-35.

[149] *Id.* at A-37.

For assistance with the DPAS program, the DoC offers "Special Priorities Assistance."[150] This assistance is available to resolve requirements that are not on the pre-approved list, to help resolve conflicting priorities, or if a vendor needs assistance in complying with a rated requirement.[151]

There are two levels of priority available to expedite delivery of required items and services: "DO" and "DX." DO rated orders have equal priority with each other and take preference over all commercial orders. DX rated orders take preference over DO and commercial orders. [152] This does not mean, however, that a contractor has to drop all work to fill the rated order immediately. Rather, it means that the contractor must meet the designated delivery date and prioritize the rated order ahead of commercial or lesser priority rated order(s) if necessary to deliver the rated order on the delivery date.[153] For this, the contractor receives his usual price for the rated order and is immunized against breach damages that might flow from delay in filling a preexisting commercial contract.[154]

In the event that different rated orders of either type pose a delivery conflict that can not be resolved within or between agencies and the contractor, Special Priorities

---

[150] *Id*. pt. 700.5 and B-16.

[151] *Id*.

[152] *Id.* pt. 700.3(b).

[153] *Id*. pt. 700.3(c) Rated orders "must be scheduled to the extent possible to ensure delivery by the requested date."

[154] *Id.* pt. 700.90; 50 U.S.C.S. app. § 2157.

Assistance should be sought from the DoC[155]. Ultimately, if two agencies cannot come to a satisfactory resolution of competing priorities with DoC assistance, the decision would have to made by the President but this has never occurred.[156]

Contractors filling rated orders frequently must ensure that rated orders are issued to their big-ticket subcontractors to ensure meeting delivery requirements under the rule of "mandatory extension"[157]. The rule also applies from subcontractor to subcontractor[158]. However, it primarily applies to requirements priced over $100,000[159] for production or construction materials, component parts, services, required packaging materials, maintenance, and operating supplies. It also applies to rated orders below the threshold when necessary to meet a priority order delivery schedule.

There are exceptions under which parties can refuse to accept a rated order. Specifically, orders that "must" be rejected include those that cannot be filled on the requested date, but the supplier must inform the requester when the order could be

---

[155] *Id.* at pt. 700.11 and pt. 700.14(c)(2). pt. 700.50 – 700.54 provides an explanation of the types of assistance available through the Special Priorities Assistance Program.

[156] Meyers Interviews. He noted that the DoC actively seeks alternative sources and works carefully with agencies who have competing requirements. Accordingly, as of the Mar. 20, 2002, the President never had to arbitrate a dispute among agencies.

[157] 15 C.F.R. pt. 700.17.

[158] *Id*. pt. 700.17(a).

[159] Currently, the Simplified Acquisition Threshold is $100,000, therefore, in accordance with the DPAS regulation, rated orders for requirements smaller than $100,000 need not be passed on as rated orders to suppliers providing items costing less than that amount unless a rating is required to obtain timely delivery. GENERAL SERVS. ADMIN. ET. AL. FEDERAL ACQUISITION REG. 2.101 (2001) [hereinafter FAR] *available at* http://farsite.hill.af.mil/VFFARA.HTM (last visited Mar. 22, 2002).

filled.[160] Additionally, suppliers "may" reject rated orders when agency placing the order is "unwilling or unable to meet regularly established terms of sale or payment"[161]. This means that the agency placing the order must be willing and able to pay the contractor the price the contractor ordinarily charges for the same or similar service[162]. Other orders that may be rejected include those for items not supplied or services not performed; orders for items produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order;[163] and orders items or services that the person placing the order produces or performs. Finally, a contractor is not required to fill an order for a requirement if doing so would violate a law or order of the DoC[164].

A party receiving a rated order must expressly accept or reject it within fifteen working days after receipt of a DO rated order or ten working days after receipt of a DX rated order. Likewise, if a condition will delay a previously accepted rated order, the orderer must be notified[165].

---

[160] *Id*. pt. 700.13.

[161] *Id*. pt. 700.13(c)(1).

[162] Meyers Interviews.

[163] 15 C.F.R pt. 700.13(c)(3).

[164] *Id.* pt. 700.13(c)(5).

[165] *Id*. pt. 700.13(d).

3. Minimizing Use of the Allocation Authority[166]

If the industrial base adequately supplies emergency needs, we will not have to allocate resources. This is a desirable outcome because the word allocate conjures up undesirable images of "rationing" and material sacrifice. However, if necessary, the President still has authority to allocate critical scarce resources[167] to industries to optimize production of defense materials[168] and prohibit profiteers from hoarding the same resources.[169] Fortunately, the allocation authority is seldom used. Currently, it only applies to metalworking machines[170] and recently it was used to address a short-lived crisis involving ammonium perchlorate rocket propellant production.[171] To continue this pattern of success, the strength of the industrial base and the application of title III production expansion programs should be monitored closely to continue our history of infrequent use of this authority. The Air Force uses a synergistic approach along these lines by managing title I and title III programs jointly in the Air Force Research Laboratory Manufacturing Technology Division[172].

---

[166] *Id*. at A-20. Allocation rules were generally used in World War II and in the Korean War to fill defense requirements that could not otherwise be met without causing economic dislocation and hardship.

[167] 50 U.S.C.S. app. § 2071(a)(2) (LEXIS 2001).

[168] S. REP. NO. 104-134, at 1 (1995), *reprinted in* 1995 U.S.C.C.A.N. 639, 640.

[169] 50 U.S.C.S. app. § 2072.

[170] *Id*. pt. 700.30, 700.31.

[171] *See* Linke *supra* note 83 at 4.

[172] Air Force Research Laboratory, Materials and Manufacturing Directorate. *See* http://www.ml.afrl.af.mil/divisions/mlm/mlm.html (last visited Mar. 19, 2002).

It is important to note that allocation authority is restrained by the requirement that the government make two specific findings. First, the material must be scarce, critical, and essential to the national defense, and, second; the requirements of the national defense cannot be otherwise attained without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.[173] This halter on the allocation authority is significant and harkens back to the 1950 rationale that no DPA authority should be inflicted on the civilian economy unless absolutely necessary.[174]

In sum, infrequent use of allocation authority indicates that our industrial base is adequately providing for defense and emergency needs. To the extent that we are able to predict shortages in a material or service that will require allocation, title III authorities, which are thoroughly discussed in the next section, empower us to do something about it. We should continue to study the industrial base for all defense requirements the way the Air Force does in its integrated execution of title I and III programs. Additionally, we should adopt this integrated approach to analyzing industrial base issues to respond to homeland security needs like water supply, power supply, and computer infrastructure integrity.[175] In the end, proper application of title III authority to expand the industrial base where we can predict emergency and war requirements will mean that we are even less likely to have to allocate scarce resources.

---

[173] 50 U.S.C.S. app. § 2071(b).

[174] *See supra* pp. 12-13.

[175] *See* LEGAL FOUNDATIONS STUDY at 2 *supra* note 4.

4. Implementation

Each agency implements the DPAS according several layers of rules and delegations. Additionally, each agency tailors its DPA policy objectives to its own needs. To start with, the Federal Acquisition Regulation[176] parrots key elements and delegations of the DPAS regulation.[177] For the DoD, there is a Department of Defense Directive on the DPAS that establishes policies and delegates authorities on the DPA.[178] Using the Air Force as an example, there are further delegations through its own policies. The Air Force combines title I and III guidance in a unified Policy Directive.[179] This directive designates Air Force policy to "comprehend the capabilities and limitations of essential industrial sectors, both private and governmental" in order to identify and prepare solutions for supply shortfalls.[180] Separate from the policy directive, there is a small reference to the DPAS in the Air Force Federal Acquisition Regulation[181] that refers acquisition personnel to the Air Force Instruction relevant to the DPAS.[182] The Air Force Instruction delegates responsibility for the Air Force DPAS program to the Air Force Materiel Command and describes how the Air Force will determine rateable

---

[176] FAR 11.602

[177] 15 C.F.R. pt. 700.

[178] U.S. DEP'T OF DEFENSE, DIR. 4400.1, DEFENSE PRODUCTION ACT PROGRAMS (Oct 12, 2001).

[179] U.S. DEPT. OF AIR FORCE, POLICY DIRECTIVE 63-6, ACQUISITION, INDUSTRIAL BASE PLANNING (Apr. 22, 1993).

[180] *Id.* at 1.

[181] U.S. DEP'T OF THE AIR FORCE, AIR FORCE FEDERAL ACQUISITION REGULATION SUPP. 5311.603 (May 1, 1996) [hereinafter AFFARS].

[182] U.S. DEPT. OF AIR FORCE, INSTR. 63-602 ACQUISITION, DEFENSE PRODUCTION ACT TITLE I--DEFENSE PRIORITIES AND ALLOCATIONS SYSTEM (March 28, 1994).

requirements, report violations, and carry out other DPAS functions. In sum, the Air Force's program is delegated to its acquisition command and is tailored to address its individual requirements. It takes a synergistic approach to using title III and I authorities to manage immediate shortfalls and at the same time understand why they occur. This approach puts the agency in the driver's seat with control of information it needs to carry out its mission. Accordingly, the Air Force is empowered to effectively catalyze the specific industrial base elements that it depends on. Indeed, this is in keeping with the spirit and intent of the authors of the DPA!

B. Expansion and Maintenance of the Industrial Base -- Titles III and VII

Titles III and VII authorize efforts under the DPA to get out in front of supply challenges for critical requirements, seemingly fulfilling the DPA's initial policy mandate to minimize the intrusion into the civilian economy. Title III authorizes the President to use financial incentives such as loan guarantees, [183] loans, [184] and grants to encourage contractors to establish or expand activities to provide increased industrial capacity for defense needs.[185] It is described as the "primary legislation designed to ensure industrial resources and critical technology items essential for national defense are available when needed.[186] Its primary objective "is to work with U.S. industry to strengthen our national defense posture by creating or maintaining affordable and economically viable

[183] 50 U.S.C.S. app. § 2091 (LEXIS 2001) (authorizing loan guarantees).

[184] *Id*. § 2092 (authorizing loans to private business enterprises).

[185] *Id*. § 2093 (authorizing purchase of raw materials and installation of equipment).

production capabilities of items essential to our national security through the use of financial incentives to stimulate private investment in relevant industry."[187]

Technically, the President delegated the title III mission to the National Security Council and the heads of "every Federal department and agency assigned functions" under the DPA.[188] This means that the heads of FEMA, Agriculture, DoE, Health and Human Services, Transportation, DoD, and DoC each theoretically have coequal responsibility in carrying it out. However, the FEMA director is specifically designated as the "advisor to the National Security Council on issues of national security resource preparedness."[189] Therefore, the focal point for DPA advising on title III, and the whole of DPA policy is the director of FEMA but responsibility for execution of title III is shared by all agencies designated. Notwithstanding FEMA's central advisory role, authority over the DPA fund used to pay for title III programs is assigned to DoD.[190] So far, this approach appears to have been successful as evidenced by the succession of industrial base expansion success stories played out since the 1950s.[191] Expanded titanium production in the 1950s and ongoing programs to expand production of silicon

---

[186] *Annual Industrial Capabilities Report to Congress*, Department of Defense at 77 (2001) *available at* http://www.acq.osd.mil/ip/ip_products.html (last visited Mar. 19, 2002).

[187] *Reauth. Hearing*, 107th Cong. at 15 (2001) (statements of Hon. David R. Oliver, Jr., Principal Deputy Under Secretary For Acquisition, Technology, and Logistics, Department of Defense).

[188] Exec. Order No. 12,919 § 104, 59 F.R. 29525 (1994).

[189] *Id*.

[190] *Id*. § 309.

[191] *Annual Industrial Capabilities Report to Congress*, Department of Defense at 77 (2001) *available at* http://www.acq.osd.mil/ip/ip_products.html (last visited Mar. 19, 2002) (noting that the DPA is the primary legislation designed to ensure that the industrial resources and critical technology items essential for national defense are available when needed).

on insulator wafers, laser protective eyewear, and microwave power tubes are several examples.[192]

However, these projects are mostly focused on advanced weaponry that enables us to reach out and touch combatant armies that threatened us in the past. Now that we have been exposed to dramatically damaging terrorist attacks on civilian targets on our own soil, it may be time to consider whether title III should be directed at technologies to protect the our civilian infrastructure. If title III is to be used to encourage the civilian sector to fortify its buildings, energy supplies, computer networks, and basic safety in accordance with the broad mandate to maintain the industrial base, money will have to be allocated for these projects. Past experience shows that carefully targeted title III project can dramatically enhance industry's responsiveness to national security needs so we should strongly consider following up on these successes to enhance security in accordance with the new threats.

Title VII is generally comprised of various implementing provisions[193] including the previously referenced "Exon-Florio" authority.[194] As noted earlier, detailed analysis of

---

[192] *Id.*, *See supra* note 18.

[193] Additional sections of title VII include the following: Public Notice for Rulemaking: Although exempt from the Administrative Procedure Act, 5 U.S.C.S. § 551 – 559 (2001), rules made under the authority of the DPA may be promulgated only when the public is given opportunity to comment. 50 U.S.C.S. app. § 2154 and 2159. The President has the authority to subpoena, or otherwise, investigate any person, place, or document as may be necessary in his discretion to enforce the DPA. *Id*. § 2155(a) and (b). This section repeats the title I possible sanctions of up to $10,000 or a year in prison or both for violating the DPA. *Id*. § 2155(c). Additionally, this section gives the President authority to keep information obtained in the investigation process confidential unless, in his discretion, withholding would be contrary to the national interest. *Id*. § 2155(d).

[194] *Id*. § 2170 - 2170a.

Exon-Florio is beyond the scope of this paper. Another title VII authority worth a passing mention is the one that provides antitrust defenses to private entities conducting joint activities at government request to tackle production and distribution problems that threaten to impair the national defense.[195]

Additionally, title VII contains the provision granting immunity from breach of contract actions between private parties where the breach was caused by compliance with a title I government priority order or allocation.[196] This provision has been litigated and will be discussed further in the next section.[197] There is general agreement, however, that it does mean that contractors complying with the letter of the law can not be penalized criminally or sued civilly for breach of contract for circumstances occurring from DPA compliance.[198]

C. Challenges

---

[195] *Id.* § 2158. Voluntary Agreements for Preparedness Programs and Expansion of Production Capacity and Supply. The government uses this DPA provision to encourage airline industry partnering to tackle the Civil Reserve Air Fleet augmentation of military airlift capabilities in preparation for conditions of national urgency. Telephone Interview with Mr. Larry Hall, Special Assistant to the Deputy Assistant Director of the Readiness Response and Recovery Directorate, Federal Emergency Management Agency (March 17th, 2002). For a description of how a commentator envisioned these agreements in the early 1950s, see George R. Lunn, Jr., *Voluntary Cooperative Action Between Industry and Government Under the Defense Production Act of 1950*, 13 FED. B. J. 35 (1952).

[196] *Id.* at § 2157. Liability for compliance with invalid regulations; discrimination against orders or contracts affected by priorities or allocations.

[197] KaCey Reed, *Casenote: The Supreme Court's Rejection of Government Indemnification to Agent Orange Manufacturers in Hercules, Inc. v. U..S: Distinguishing the Forest from the Trees?*, 31 U. RICH. L. REV. 287 (1997); Susan Rousier, *Note and Comment: Hercules v. U.S.: Government Contractors Beware*, 19 WHITTIER L. REV. 215 at 229 (1997).

[198] *See infra* Part III. C. 3.

1. Constitutionality

Though an in-depth constitutional analysis of the DPA is beyond the scope of this paper, it seems clear that it is constitutional. This is because the President, acting in accordance with the DPA, acts pursuant to an express authorization of Congress and is supported by the "strongest of presumptions of constitutionality."[199] Although it might at first blush seem that the "conscription" of a contractor to deliver a product under the title I construct is un-American, the courts have not found anything unconstitutional about it.

The constitutional authority of the DPA today and since its inception stem from the War Powers Clause of the Constitution. Article I, Sec. 8 of the Constitution of the United States provides, in relevant part, that "the Congress shall have power to declare war, to raise and support armies, to provide and maintain a navy; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[200]

In support of the peacetime legality of the DPA,[201] the courts have found that the United States need not be at war for Congress and the Executive to possess constitutional

[199] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 at 635 (1952) (Jackson, J. concurring) (holding President Truman's steel mill seizure without statutory authorization was unconstitutional although it was done during armed conflict for the purpose of preventing disruption of steel supplies to military purposes).

[200] U.S. Const. art. I, § 8.

[201] 50 U.S.C.S. app. § 2062(a)(2) (LEXIS 2001) (providing that in peacetime, the health of the industrial and technological base contributes to the technological superiority of the United States defense equipment, which is a cornerstone of the national security strategy, and the efficiency with which defense equipment is developed and produced); See also *Id.* § 2062(a)(4)(providing that continuing international problems justifies some diversion of certain materials and facilities from civilian use to military and related purposes).

sanction to prepare for war.[202] Additionally, the courts have stated that the "War power a is broad and comprehensive grant; it is well nigh limitless; it embraces those powers necessary to maintain national defense and security; it is essential to preservation of country as independent nation and perpetuity of liberties."[203] Finally, regarding the Constitutionality of the DPA's priority in contracting section,[204] the Court of Appeals for the 5th Federal Circuit stated, "It is not a constitutional infirmity that [the priority contracting provisions of DPA] may result in a loss of, or interference with, private contractual rights."[205]

2. Controversy – Mixed Reactions to the DPA

The Act is not without critics and controversy. Prior to September 11th, 2001, Senator Phil Gramm of Texas, called for a comprehensive rewrite of the act labeling it as follows:[206]

---

[202] United States v. Chester 144 F.2d 415 (3d Cir. 1944) (finding the Lanham Act condemning property for use in constructing housing for workers engaged in national defense activities Constitutional).

[203] Porter v. Shibe, 158 F.2d 68 (10th Cir. 1946) (finding rent control provisions of the Stabilization Act of 1942 constitutional).

[204] 50 U.S.C.S. app. § 2071 (LEXIS 2001).

[205] Eastern Airlines, Inc. v. McDonnell Douglass Corp., 532 F.2d 957, 995 (5th Cir. 1976) (holding that even a verbal threat of a DPA priority order is enough to invoke the immunity from breach of contract provisions of the DPA found at § 2157).

[206] News from the Senate Banking Committee, Senator Phil Gramm, Chairman, GRAMM OUTLINES COMMITTEE AGENDA FOR THE 107TH CONGRESS, at http://banking.senate.gov/prel01/0122prcf.htm (last visited Jan. 22, 2002).

> We're going to do a comprehensive rewrite of [the Defense Production Act]. [It] is probably the most powerful and potentially dangerous piece of American law. It gives the President extraordinary powers. Richard Nixon imposed wage and price controls under the Defense Production Act. And so we're going to take a long, hard look at both these bills and do a comprehensive rewrite of both.[207]

He opposed it because he found it to be anti-free market[208]. Since September 11th, Senator Gramm has been silent regarding the DPA[209].

Even in the clamor of public support surrounding the Gulf War, the DPA was criticized. Stanley Dees, a partner with the prominent Washington D.C. law firm McKenna & Cuneo, complained that

> The DPA is an extraordinary power of the United States -You're talking about forcing people to do business with the government whether they want to or not -- to the possible detriment of their relations with their commercial clients. You're talking about taking property … The government has to be very careful about how they exercise the power because it comes very close to trampling on Fifth Amendment rights.[210]

---

[207] *Id*. *See Supra* note 16 and accompanying text (noting the President Nixon used the Economic Stabilization Act to institute wage and price controls because such authority has not existed in the DPA since 1953).

[208] *Id*.

[209] This author requested a statement from his office via telephone and email and received no answer.

[210] Tom Watson, *Free Hand on the Home Front; Bush Taps Store of Domestic War Powers*, LEGAL TIMES (Feb. 11, 1991). American Lawyer Newspapers Group Inc.

Notwithstanding this criticism and Senator Gramm's demand for an overhaul, the DPA was reauthorized for a three-year period without significant adjustment just following September 11th, 2001[211].

Generally, reaction among industry is favorable[212]. Indeed, John T. Jones, Esq., noted that it has been helpful to government contractors in combating price increases by suppliers[213]. He reported that a supplier attempted to dramatically increase the price for software it provided to the government contractor for previous orders. The software was urgently needed to deliver a product provided to the government under a priority rating. There was no economic reason for the price increase. However, the contractor/buyer brought the anti-price gouging provision of the DPA to the supplier's attention and convinced the supplier to reduce its price.[214] This incident suggests that increased understanding of the DPA will benefit government efficiency.

3. Litigation

Some of the critics' gripes have reached the courts and the litigants of the DPA share the fate of litigants of predecessor wartime government contracts legislation -- they lost.

---

[211] 50 U.S.C.S. app. § 2166 (LEXIS 2001).

[212] Meyers Interviews.

[213] Presentation by John T. Jones, Jr. to the 2001 Contract Law Symposium, Dec. 6, 2001, The Army Judge Advocate General's School, Charlottesville, Virginia. *See supra* note 119.

[214] No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this act…or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.50 U.S.C.S. app. § 2157.

A commentator during World War Two put it aptly when he said "The commandeering of private property and the *juggling of contracts* by government during wartime has a long history. The injured parties frequently attempt later to lick their wounds in court, but often to no avail"[215].

Several non-DPA government contracts cases teasingly imply that a compensable taking claim could lie against the government in an *involuntary* business relationship like a DPAS compulsory contract[216]. Of course, the Kearney and Trecker case laid that issue to rest regarding DPAS takings claims[217]. However, the more the DPAS system is needed and used to prioritize government contracts ahead of commercial contracts, the more litigants there may be. Indeed, the current crisis may increase the number of complainants against the DPAS system, especially if DPAS priorities must be used against non-traditional defense suppliers. It is easy to conceive of pharmaceutical or security equipment companies receiving DPAS orders to address anthrax and airport security requirements. Of course, patriotism will keep some of the frustration in check but at the point that businesses perceive they are missing out on more profitable orders while they are filling DPAS rated orders, there may be increased litigation. For this reason, it behooves the government to use the DPAS sparingly and to use title III to build

[215] Frey, *Contractual Problems of War and Peace*, 30 VA. L. REV. 1 (1943).

[216] Sun Oil Co., Superior Oil Co. and Marathon Oil Co. v. United States, 572 F. 2d. 786, 818 (Ct. Cl. 1978) (noting that the concept of a taking as a compensable claim has limited application when rights have been voluntarily created by contract) *Accord* Hughes Communications Galaxy, Inc. v. United States, 271 F. 3d 1060, 1069 (Fed. Cir. 2001).

[217] *See supra* pp. 20-21.

up industrial capabilities to meet the new threats so that coercive DPAS authority is needed less often.

Another important DPA litigation issue is tort liability. Contractors filling DPAS order should keep the Agent Orange cases[218] in mind and realize that just because they are giving a government contract priority, they are not automatically indemnified for litigation involving injuries caused by their products.[219] Accordingly, DPAS participants should bear in mind that the immunity provision is limited to allegations of criminal noncompliance with the DPA and suits for breach of contract by displaced commercial orderers.[220]

4. Relief through PL 85-804 -- Extraordinary Contractual Relief?[221]

An article in the Government Contractor and notes on several private law firm web sites recently suggested contractors injured financially by DPA orders might be eligible for compensation through the Extraordinary Contractual Relief law, P.L 85-804.[222] As discussed above, profit losses due to DPA orders are mostly viewed as non-compensable inconvenience. However, Extraordinary Relief was used to assist perchlorate rocket fuel

[218] Hercules Inc. et. al. v. U.S., 516 U.S. 417 (1996).

[219] *See* sources cited *supra* note 76.

[220] Appeal of Elser Elevator Company, Appeals Case No. 298, VA BCA (LEXIS 1960).

[221] 50 U.S.C.S. § 1431-1435 (LEXIS 2001).

[222] *Operation "Enduring Freedom" Triggers Emergency Contracting Rules*, THE GOVERNMENT CONTRACTOR, 17 Oct. 2001; *DOD Likely to Use Defense Production Act as it Gears Up for War on Terrorists*, Fed. Cont. Rep., Sept, 25, 2001); *Defense Production Act Requirements,* Arnold and Porter

manufacturers struggling to increase production in the late 1980s.[223] Nevertheless, contractors should not be fooled into thinking that Extraordinary Relief money will flow freely just because of inconvenience or lost profit occasioned by a DPAS order. Indeed, There do not appear to be any recorded cases of extraordinary relief being used to correct injuries due to contractors inconvenienced by DPAS orders.[224]

However, it is not inconceivable that a DPA induced hardship could be appropriately averted or mitigated through the use of Extraordinary Contractual Relief authority. Generally, the Extraordinary Relief law allows the President to authorize any agency with national defense responsibility to modify a contract or make advance payments if it would facilitate the national defense without regard to other provisions of law relating to contracts.[225] This discretion is not completely unfettered. The action may not create a "cost-plus-a-percentage-of-cost" contract, or improperly violate laws relating to competition in contracting, profit limits, payment, performance, or bond, or result in a price higher than the lowest rejected responsible bidder's price in a sealed bid procurement.[226] Additionally, extraordinary relief can not be used to improperly

---

Advisory, 28 Sept 01; *The Defense Production Act of 1950*, McKenna & Cuneo Client Alert (Oct. 2, 2001), http://www.mckennacuneo.com/articles/article_detail.cfm?498.

[223] Linke *supra* note 83, at 44 (noting that P.L. 85-804 authority can be used to expedite payment or authorize advance payment to a contractor in defense emergency conditions).

[224] Telephone Interview with Mr. Carl Vacketta, partner, Piper Marbury, L.L.P. (Feb. 2002) (Mr. Vacketta is the editor of the Extraordinary Contractual Relief Reporter – he opined that 85-804 relief would not be granted for mere lost profits because of a DPA order). But see Linke at 24 (noting that the Air Force used P.L. 85-804 authority to provide $20,000,000 to the sole producer of a critical rocket material whose business was on the brink of collapse).

[225] 50 U.S.C.S. § 1431 (2002).

[226] 50 U.S.C.S. § 1432 (2002).

formalize an informal commitment.[227] Subject to these limitations, it is conceivable that a contractor faced with the prospect of losing substantial commercial business because his capacity was consumed by DPAS orders could obtain advance payments under 85-804 to underwrite a capacity increase. Alternatively, however, the same situation could be solved if title III's loan guarantee provisions[228] could be applied.

IV. Recommendations and Conclusion

The DPA is critically important to the current war effort and to maintaining our long –term national security in the face of new threats. As in the past, the DPA must be studied and used judiciously, deliberately, and synergistically. The DPA was well conceived and is now well refined for these purposes. However, the massive attacks on civilian lives and property that occurred on September 11th require additional emphasis on homeland security measures. Accordingly, the government acquisition community should consider how title III could be used to better protect our critical civilian infrastructure.

With our economic institutions trembling[229] and our military broadly extended, we need to understand and apply the DPA's full range of authority. Title I priority contracting authority gives the government immediate access to the stocked shelves of

---

[227] *Id.*

[228] 50 U.S.C.S. app. § 2091 (LEXIS 2001) (authorizing loan guarantees).

[229] Cable News Network, *The Return of Rising Profits*, *at* http://money.cnn.com/2002/03/22/markets/sun_lookahead/index.htm (last visited Mar. 24, 2002) (reporting that American business profits have fallen for the last five quarters).

American industry. Title III industrial base expansion programs can give American industry the means to restock the shelves with tools required for defense and security in the future. The DPA is a proven mechanism. Its array of authorities took us valiantly through fifty staggering years of Cold War defense industrial production. By applying its authorities to this new fight judiciously, the DPA will see us to a more secure future.

The DPA does not require significant modification to take us through the current crisis. It is already a symbiotic construct. Between title I's control authorities and title III's incentive authorities, it encompasses a classic carrot and stick approach to getting what the government needs from industry. With judicious use of both authorities, our industry will respond to the call. We have to be careful to issue only DPAS rated orders that are absolutely necessary so that civilian commerce is not unduly disrupted. Proposed title III programs must be carefully evaluated to selectively incentivize the industries that need a boost. Perhaps we must enhance the industrial base providing chemical weapon antidotes, protective gear, attack resistant construction, or improved security screening equipment for homeland defense as we did with the titanium industry when we needed it for jet aircraft in the 1950s. On the other hand, if the industrial base is able to respond to our security needs without intervention, we should heed the advice of the Congress in 1950 and let the economy respond on its own.[230] In any event, a careful evaluation of the DPA's goals, tools, and past successes will lead to the conclusion that its authority should be applied to the new security paradigm established by the September 11th, 2001 attacks. Careful review will establish that title I authorities should not be changed at all and title

[230] *See* sources cited *supra* note 3.

III programs should be increased to include industrial base measures that will enhance homeland defense.

This paper illustrates that the DPA's authorities will enable us to respond to the September 11th, 2001 attacks. Indeed, Congress was right on target when it proclaimed "the vitality of the industrial and technology base of the United States is a foundation of national security that provides the industrial and technological capabilities employed to meet national defense requirements, in peace time and in time of national emergency."[231] Accordingly, it provided the DPA, as amended, to harness the might of American industry in furtherance of national security. Therefore, the acquisition community must study this law and use its authorities to fight the battle at hand and to prepare for challenges to come.

SHAKESPEARE AND THE LAW

"Life" may be, as Shakespeare said in *Macbeth*, a "tale told by an idiot," but that does not preclude one from acting wisely in seeking to contract to sell goods and services to the United States government. Over the years I have represented companies in "bid protests" and contract

[231] 50 U.S.C.S. app. § 2062(a)(1).

disputes before the General Accounting Office, boards of contract appeals and federal courts. More recently I have acted as a subcontractor on a contract with the U.S. Commerce Department. Below I share some of my experiences in the government contracts field through aphorisms of William Shakespeare, whose language embraces not only the human condition, but, inevitably enough, the pitfalls and vagaries of contracting with the federal government.

Act I – Preparing Your Proposal

1. **"*Know you not how your state stands i' the world, with the whole world?*"** (*King Henry VIII*).

In preparing your proposal, strive to know what the government seeks and the rules that govern the procurement. Federal government agencies often are required to use a competitive procurement before awarding a contract for the acquisition of goods or services on behalf of the government. But the nature of one procurement may be significantly different than another. Within the principal types of procurements (supplies, construction, services, research and development, and real property leasing) are many specialized forms of contracting vehicles. The classification of the procurement may determine the type of contract to be used, the funding source for the contract, the applicability of various contract clauses and whether certain socioeconomic programs are impacted. Would-be contractors are well-served by knowing as much as possible about the specifics of the contract and how the proposals will be evaluated.

The starting ground is the document issued by the government that seeks proposals to enter into a contract with the government. This document is sometimes a "solicitation" or "request for proposals" (RFP) or "invitation for bids" (IFB), though increasingly the government uses more informal devices, such as a "blanket purchase agreement" (BPA). Much of the applicable rules are set forth in the federal acquisition regulation (FAR), 48 Code of Federal Regulation (C.F.R.). Agencies also have their own procurement regulations which must also be considered. Often the regulations that govern a procurement are not fully set forth in the request for proposals, but instead are merely incorporated by reference. Contractors need to know what the incorporated provisions say, so that they know with what they are promising to comply. It is important to remember that the nature of contracting vehicles continues to undergo a dramatic shift away from more formal documents to more informal ones. Do not assume that agencies will always procure specific goods and services in the same manner as before. You must also know the extent to which certain requirements may apply to the contract at issue. For example, is there a requirement that all or a portion of the goods or services be of U.S.-origin? Is the government demanding that a preference should be given to awarding the contract (or a portion thereof through a subcontract) to a socially and economically disadvantaged small business concern?

When in doubt as to the requirements of a request for proposals, seek clarification; otherwise a mistaken assumption on your part may result in either having your proposal rejected, or being stuck with having to perform a contract to which you never would have agreed had all the relevant facts been known and understood.

2. ***Glendower: "I can call spirits from the vasty deep."***
Hotspur: "Why, so can I, or so can any man; But will they come when you do call for them?" *(Henry IV, Part 1)*

"*But as he was ambitious, I slew him*." (*Julius Caesar*)

In making your proposal, make sure you can deliver on what you promise. The proposal you make is a legal "offer" to enter into a contract. If the government accepts the proposal, you will be contractually bound. If the contract provides that the government will pay a set fee for goods or services, the bidder must be careful to ensure that its proposed price will be high enough for it to make a profit on the contract. Awardees cannot terminate such contracts simply because they misjudged the actual costs they would incur to perform. If the chance to make money from the government seems too easy, be concerned. "Thou canst not do a thing in the world so soon, to yield thee so much profit." (*Pericles*) If the contract requires the government to reimburse the awardee for the costs it incurs to perform, the contracting officer may refuse to credit the figure proposed by the bidder for its expected costs. In a case (in which I was not involved) for a contract to provide advertising services to the U.S. Marine Corps, the contracting offer adjusted an advertising agency's proposed costs upward based on the likelihood that the ad agency would need to pay higher salaries to attract qualified personnel to fulfill the contract.

Do not promise that certain key individuals will be available to perform a contract if you have not already received the written commitment of such persons. One of the most common grounds for filing an initial protest of a contract award is that the winner engages in a "bait-and-switch" scheme, in which a particular person is listed in the proposal as an individual who would perform a key aspect of the contract, but, upon award, the contractor no longer intends (or is able) to use that person. I have been on both sides of this issue, on repeated occasions. In a recent bid protest (where I represented the awardee), the losing bidder initially protested on the ground that the principal individual designated by my client to supervise performance of the contract (to provide certain legal advisory services to a foreign government) was in fact not going to be involved. However, my client had acted in good faith in proposing this person. It was not until after the agency had awarded the contract that the agency, on a discretionary basis, decided (solely for political and diplomatic purposes) that the supervisor needed to be a U.S. citizen, a status that the person proffered by my client did not have. This ground of protest ultimately was denied as baseless, and 99% of the case revolved around different challenges to the contract award. However, by using the alleged "bait-and-switch" as the initial ground of protest, the protester was able to get its hands on the confidential administrative record underlying the procurement and award decision. As counsel for the protester, this is almost always the strategy to follow: use whatever theoretical basis you can to file the protest and obtain access to the administrative record: once such access is gained, the odds are strong that you will find *something* else to challenge. It is a rare procurement indeed which contains no mistakes; the only question is whether the protester's counsel will locate the error(s) in time, and whether the error(s) will be material – *i.e.,* if corrected they could change the outcome of the contract award.

Do not assume you will have access to the necessary personnel, goods or services necessary to fulfill your obligations under the contract at a price that still allows you to make money. I was once called upon to advise a computer systems integrator that had entered into a multi-year contract with a branch of the Armed Forces to replace certain switching equipment. The contract specified a certain type of switch – unfortunately, the only company that possessed those switches was a competitor that was angry about the manner in which a salesperson for the awardee had conducted himself in the procurement. Consequently, they refused to sell the switches at anything but vastly inflated prices which would have deprived the awardee of all profits under the contract. The contractor could have avoided the considerable distress it experienced had it thought, ahead of time, to obtain the agreement of the supplier to sell a specified volume of the critical switches at a specified price. Instead, it confronted the unenviable choice of either losing millions on the contract or defaulting.

3. "*I wasted time, and now doth time waste me.*" (*Richard II*)

Avoid wasting your chances by failing to comply with the applicable deadlines. As a mentor of mine in government contracts law used to say, contracting in general is fairly simple but "the deadlines are killers." No matter how good your proposal is, or the basis for a protest of an award, if an applicable deadline is missed, no contractor "shall be pleased till he be eased with being nothing." (*Richard II*) One of my first solo cases was to represent a subcontractor who had diligently worked to support the efforts of a major accounting firm to submit a proposal to provide services to NASA. The accounting firm missed the 5:00 p.m. deadline for submitting the proposal to NASA by a few minutes because the driver of the cab in which the proposal was being rushed got caught in traffic as a result of Vice President Quayle's motorcade. The subcontractor (who had no part in the delay) argued (and rightly so) that it should not be penalized for the accounting firm's decision to wait until very near the last minute before sending the proposal across town.

Deadlines are especially critical when a party chooses to "protest" either the contract award or some other aspect of the procurement. To be timely, protests must be filed with GAO not later than 10 days after the basis for the protest is known or should have been known, whichever comes first. If the protest challenges improprieties that are apparent prior to the bid opening date or the deadline for the initial proposals, the protest must be filed prior to that date.

4. *"For Brutus is an honorable man; So are they all, all honorable men."* *(Julius Caesar)*

Proposals to provide products and services to the government often contain data or ideas that are confidential. Do not assume you will be dealing only with "honorable" contracting officials when submitting these materials. I am currently involved in a case where an advertising agency responded to a government solicitation for advertising and marketing services by developing a strategic marketing plan for the promotion of the government program that was the subject of the procurement. The government accorded high ratings to the client but ultimately decided on a much larger competitor. However, this did not prevent the government from having the winner use the strategic marketing plan proposed by my client to promote the program. Significantly, the government invited bidders to mark "confidential" those portions of their offers which were not to be used or disclosed by the government without permission. In this context, my client acted wisely by ensuring that those pages of its proposal which contained the proposed marketing strategy were properly labeled "confidential." This was critical because the issues at trial will revolve around the government's claimed defense that it developed the nearly identical marketing strategy from an independent third-party source – but the issue of whether the government had a contractual obligation to treat my client's proposed strategy as confidential is not in genuine dispute.

5. "*Not all the water in the rough rude sea can wash the balm from off an anointed king.*" (*Richard II*)

Do not ignore the natural advantages enjoyed by the incumbent contractor. The incumbent already will have established professional and perhaps personal relationships with the contracting agency personnel, and will already know the philosophy behind the agency's projects and the needs and plans for additional work. To try to level the playing field, use requests for information under

the Freedom of Information Act (FOIA) to obtain as much information as possible regarding how the contract is currently being performed by the incumbent.

Act II – "To Protest or Not to Protest."

6. **"*The means that heaven yields must be embraced, and not neglected; else … we refuse, the proffer'd means of succour and redress.*"** (*Richard II*)

"The time is out of joint: O cursed spite, that ever I was born to set it right!" (*Hamlet*)

You submitted your proposal but "something is rotten in the state of Denmark," and the award is made to a competitor. To protest or not to protest is often the question. Often, it is the unsuccessful bidder which has the best "feel" for knowing whether they were mistreated in the procurement process. Unsuccessful bidders sometimes would prefer not to pursue a protest, either to avoid the distraction or legal fees, or because of a sense that the government officials might be angered and hold a grudge. ("We were not born to sue, but to command." *Richard II*) But money is money and opportunities are opportunities. If the government agency has made a mistake and the correction of the mistake could change the outcome of the award, a protest may well prove fruitful. The Equal Access to Justice Act may require the government to refund the attorneys fees incurred to prepare and litigate the protest and the agency officials are used to having awards challenged in protests. Unless the protest includes personal allegations of bad faith or malfeasance by them (assertions which rarely succeed), they are treated as business as usual by the contracting officials.

In deciding whether to protest, the bidder must be honest with itself as to why the contract was lost. If "[t]he fault dear Brutus is not in our stars, but in ourselves that we are underlings" (*Julius Caesar*), the energies should be directed on improving the proposal to be made the next time, rather than a challenge of what has transpired. By contrast, if the agency really did make a mistake, a protest may be the only way to bring it to light and to discipline the agency into being less careless next time.

Protests can be filed at the agency level or with the Comptroller General of the General Accounting Office. The filing of the protest frequently results in the contract award being stayed pending the outcome of the protest. Although agency-level protests are often faster and cheaper than GAO protests or court proceedings, there is always an advantage to having a disinterested decision-maker involved. If a protest is to be made, the company often will need outside counsel. This is not only because of the specific and sometimes arbitrary rules that govern these proceedings (and the short and killer time deadlines), but also because protests frequently require the exchange of confidential business information (such as unit prices, strategies, financial information, etc.) The lawyers for the protesting party (and the awardee, which is called the "intervenor") will sign "administrative protective orders" (APOs) that preclude them from disclosing information properly marked confidential or from using the information for any purpose other than litigating the protest. (In the Marine Corps case, the intervenor's in-house general counsel was not permitted access to the APO because of an untenable risk that the counsel, who also advised the company on responding to proposals, would inadvertently disclose confidential information of the competitor to company officials.)

Act III – Performance of the Contract

7. **"*The evil that men do lives after them; The good is oft interred with their bones.*"** (*Julius Caesar*)

How you perform will affect your ability to get more contracts in the future. Many procurements require the competing bidders to be evaluated on their "past performance" that is relevant to the contract to be awarded. This will require the bidders to list and provide a description of prior work they have undertaken which helps to show their ability to satisfy the contractual requirements. Government personnel evaluating the proposals may contact those with knowledge of the prior performance, especially if the work was done under a previous government contract. Thus, not only should you always strive to ensure that you completely perform under all contracts; but also if you find yourself in a contract that no longer seems profitable or otherwise suitable, you should be careful not to act in such a manner that will haunt your prospects in future procurements.

8. ***Buckingham: "I am thus bold to put your grace in mind of what you promised me."***
King Richard: "… I am not in the giving vein today." *(Richard III)*

Contractors frequently are asked or required to undertake additional work than that specified under the contract. In doing so the contractor needs to make sure that the additional tasks are authorized, otherwise the contractor risks not receiving payment for the added effort. A fundamental rule regarding government personnel is that the government is not bound by unauthorized acts of its officers or agents, including a promise to pay for something to be provided in excess of the written contract. Most government personnel with whom a contractor deals do not possess full authority to enter into contracts which bind the government. Nevertheless, sometimes the official will have "implied authority" to bind the government. (By contrast, "apparent authority" – which is sometimes sufficient in the private sector – will not bind the government.) Still, why take the chance? Whenever possible obtain the written authorization of the contracting officer before undertaking additional work. If you are uncertain whether the government representative requesting the additional work or contract modification has authority to bind the government, request to see the document which grants the representative with such authority. Alternatively, keep in mind that the unauthorized action of a government representative can be subsequently ratified by those with authority to bind the government.

9. **"*Upon familiarity will grow more contempt.*" (***The Merry Wives of Windsor*)

Follow sensible limits in your dealings with agency staff. As reflected above, an advantage of being the incumbent contractor is that you develop relationships with the agency personnel who may be involved in a future procurement by the agency. But be careful to ensure these relationships are not perceived as anything other than arms-length professional working arrangements, lest a competitor in the next procurement accuse you of having an unfair advantage. In a recent case, my client was only trying to help when it responded to the inquiry of an official at the contracting agency for suggestions as to a suitable replacement supervisor for work on the contract that was in place. The problem was that different officials at the same agency were concurrently acting as an evaluation board with respect to a "re-procurement" of that same contract, and one of the issues in the protest was whether the initial supervisor proposed by my client was part of a "bait-and-switch" scheme. It also did not help that the protester had already accused the agency of exhibiting favoritism towards my client. The lesson is that even if the government initiates a communication, a contractor needs to decide for itself whether an intended response to the agency is appropriate.

10. **"*Banish not him thy Harry's company, Banish plump Jack, and banish all the world.*"** (*Henry IV, Part I*)

In performing a government contract, it is vital to deal truthfully with the agency. "False claims" in invoices and other documentation submitted to the government can lead to criminal sanctions, as well as either "suspension" or "debarment" from government contracts *with all federal agencies*. Companies (and individuals) also can be debarred because of the commission of fraud or a criminal offense in connection with (1) obtaining, (2) attempting to obtain, or (3) performing a public contract or subcontract; for violation of federal or state antitrust laws relating to the submission of offers; for commission of embezzlement, theft, forgery, bribery, falsification or destruction of records or receiving stolen property; or commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor. Debarment generally precludes contracts with any agency of the federal government for up to three years (or longer).

* * *

"Brevity is the soul of wit" (*Hamlet*) but cannot do justice to the complexities of the federal contracting process. But the experience-driven suggestions listed above provide a crucial starting point for helping to ensure that the government contracting process is a positive and profitable one. After all, "what is past is prologue." (*The Tempest*)

This article is a publication of Schnader Harrison Segal & Lewis LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. For further information, please contact Roy Goldberg at 202-216-4227 or rgoldberg@schnader.com, or visit www.schnader.com.

Joe McDade [Deputy General Counsel(Dispute Resolution)] and his ADR team do it again!!

AIR FORCE WINS BEST NEW ALTERNATIVE DISPUTE RESOLUTION AWARD

WASHINGTON, D.C. - At an awards ceremony held today in the Old Executive Office Building, the Air Force received the award for having the best new alternative dispute resolution program in the entire Federal Government.

ADR refers to resolution strategies that permit the Air Force and its suppliers to resolve contract controversies without litigation. This award marks the fourth national award given to the Air Force for its outstanding achievements in using ADR and specifically recognizes the Air Force for what it has achieved in resolving contract disputes since January 2000. Dr. Marvin R. Sambur, Assistant Secretary for Acquisition, accepted the ADR Award on behalf of the Air Force from Angela Styles, Administrator of the Office of Federal Procurement Policy.

Among the reasons the Air Force received this coveted award include the fact that ADR helps to avoid millions of dollars in interest and litigation expenses by reaching conflict resolution in months rather than years, as is often the case with litigation. In addition, payments made to contractors in ADR proceedings since January 2000 are consistent with historical averages for cases resolved before the Armed Services Board of Contract Appeals -- indicating that reduced cycle time was not achieved by ignoring the merits of each case.

After signing ADR agreements with 17 corporations and 88 programs, every contract controversy raised by a signatory to an Air Force ADR agreement was resolved through the use of ADR -- leading to a dramatic reduction in litigation at the ASBCA.

The Air Force made a commitment to all of its defense contractors to resolve disputes cooperatively. Large and small-business defense contractors joined the Air Force in resolving 70 disputes involving over $170 million using efficient and effective ADR techniques.

Over the past several years, ASBCA judges have provided ADR services in contract appeals with a 97 percent resolution rate. According to Chairman Williams of the ASBCA, "it is clear beyond doubt that ADR works as advertised and the ASBCA is committed to making our judges available to provide ADR services."

Sambur said, "this program is an excellent example of the flexibility and innovation the Air Force needs to foster and support its Agile Acquisition initiatives." The Air Force Agile Acquisition initiative is intended to dramatically improve the time, cost and process for acquiring and fielding weapon systems to warfighters.

Sambur also praised the efforts of several senior Air Force leaders in helping make this an award-winning program. He praised Darleen Druyun, Principal Deputy Assistant Secretary for Acquisition and Management, "for her vision, leadership and commitment to making ADR a priority for the acquisition community."

Sambur also thanked Mary Walker, General Counsel of the Air Force, and Maj. Gen. Thomas Fiscus "for the outstanding partnership forged between the Office of the General Counsel and the Judge Advocate General's Department in supporting this program."

Joe McDade, Deputy Dispute Resolution Specialist, credited the hard work of the men and women of the Directorate of Contract Dispute Resolution and the commitment of our acquisition and contracting communities as being the key to the success of this program. McDade stated, "in my opinion this program is an example of the Air Force at its best -- strong leadership and vision from the top and extraordinary work by the field."

The Air Force worked with a group of senior Government and Industry officials to jointly develop an ADR guidance manual and is currently working on a large-scale joint training effort to promote the early identification and resolution of issues in controversy. Details regarding these and other ADR Program efforts are available on the web at http://www.adr.af.mil.

GSA LOOKS TO COLLECT FEES ON AN EXPANDED RANGE OF SALES

By: Christopher R. Yukins

As administrator of the Federal Supply Service Multiple Award Schedule contracts, the General Services Administration is entitled to collect an Industrial Funding Fee of 1% of the contract sales to cover its administrative costs. However, GSA has expanded the range of transactions subject to the Industrial Funding Fee and claims that the IFF should be paid on all schedule-listed items sold to the government -- even when those items are not sold through the GSA schedules program, but are instead "unidentified." GSA is, in essence, demanding that the contractor prove a negative. The contractor must (in GSA's view) prove those sales were not subject to the IFF.

In many ways, this approach turns the law on its head. Normally, the legal burden of proof is on the person claiming a fee on sales. Here, however, GSA wants to impose that burden on its contractors. That runs contrary to normal commercial law, and indeed runs contrary to a recent case decided by the GSA Board of Contract Appeals. See GE Capital Information Technology Solutions-Federal Systems, GSBCA No. 15467, 01-2 BCA ¶ 31,445 (June 4, 2001) (noting government's burden to prove claim that contractor underpaid IFF).

The cases that GSA cites to support its expanded recovery of fees do not resolve the IFF issue. Photon Technology International, Inc., GSBCA No. 14918, 99-2 BCA ¶ 30,456 (June 23, 1999), a non-precedential opinion, specifically declined to address the question whether IFF payments were due on items that the contractor claimed were not schedule sales. And GE Capital, another case often cited to contractors, also never reached the

question here: whether GSA can assume that all items listed on the schedules, when sold by a schedules contractor, are indeed "schedules" sales.

Indeed, some of the recent cases seems to point in the opposite direction. One recent case before the General Services Board of Contract Appeals (GSBCA), though non-precedential, emphasized that where a vendor does identify a sale to a schedules contract, that contract does bind the vendor on the sale. Contemporaries, Inc., GSBCA No. 15660, 02-1 BCA ¶ 31,709 (Nov. 29, 2001). Logically, therefore, where a contractor does not tie a sale to the schedules, the burden should be on GSA to prove that the sale should be tied to the schedules contract. Taking this narrower, less presumptive approach seems especially appropriate because the GSA schedules are themselves a narrow, delimited exception to the normal competition requirements under the Competition in Contracting Act. See ATA Defense Industries v. United States, 38 Fed. Cl. 489 (1997).

GSA's presumption that it is entitled to fees on all sales of schedules-listed items also runs counter to customer agencies' preference. The agencies have made it clear that they prefer to avoid the constraints of mandatory-use schedules, which customer agencies must use for certain requirements. Cf. Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000) (failures on mandatory-use contract caused substantial costs for government). By imposing the IFF against all "unidentified" sales, however, GSA is, in principle, returning to a mandatory-use schedule: GSA assumes that, for these "unidentified" sales, agencies can purchase only through the GSA schedules, and only by paying the IFF.

When GSA originally proposed the IFF, GSA suggested that the IFF should be centrally administered by GSA . Vendors would boost prices by 1 percent, but would invoice GSA for only the "original" price. GSA would pay the vendors only the lower price, but would recover the full "boosted" price from customer agencies, and GSA would retain the difference. Customer agencies opposed that approach, however, in part because it would have meant, in practice, that they would be paying IFF on nonschedule items. Accordingly, the final rule issued in 1995 adopted a more flexible, decentralized approach to the IFF. See 60 Fed. Reg. 19360 (Apr. 18, 1995) (final rule).

GSA's presumptive claim for IFF on all "unidentified" sales of schedules items seems to return to that same problem. The agencies made clear in 1995 that they did not want to shoulder IFF payments on nonschedule items. By taking an expansive approach now, however, GSA is arguably ignoring the agencies' wishes, and would apply the Industrial Funding Fee to a much broader array of sales.
Perhaps most seriously, GSA's approach may force vendors to impose a protective 1 percent surcharge on all "unidentified" sales, to protect the vendors against an IFF claim by GSA. It is highly unlikely, though, that customer agencies would welcome this price increase. A better approach -- for GSA, its customer agencies and vendors -- would be to take a more reasoned, careful approach to determining which sales, exactly, should be subject to the IFF.

An earlier version of this article was printed on the immixGovernment website.

LEGISLATIVE COMMITTEE

The BCABA has for some time considered what, if any, its role should be in the legislative arena. With no agenda in mind, Peter McDonald, Dave Metzger and I visited with Hill Staff during my tenure as President in an effort to introduce the Association and its membership to Congress. Our hope was that we could provide assistance and education if an issue arose that concerned the Boards of Contract Appeals specifically or the government contracts practice as a whole. In a similar vein, Dave Metzger, in his role as President of the BCABA, effectively expressed the Association's concern over the DC Bar's proposal to re-classify its judicial members. In the end, the re-classification was reversed. So we do have a voice and we are willing to be heard. Now we are faced with the question once again – what is our role going to be?

The White House believes that small businesses should have greater access to government contracts and should not be discouraged by a "costly, complicated and burdensome appeals process." As such, President Bush has expressed his support for the idea of consolidating the Boards of Contract Appeals in an effort to streamline the appeals process. The entire proposal can be found on the White House web site at www.whitehouse.gov/infocus/smallbusiness/taxpayer.html. Our current President, Pete McDonald, believes that now is the time for the Association to form a standing legislative committee that could take matters such as the White House's proposal under consideration and formulate a course of action if it is determined that one is needed. He has asked me to chair the committee and after much kicking and screaming, I have agreed to do so.

It is often difficult for an Association with a broad-based membership such as ours to reach a consensus on an issue such as consolidation and then be able to move forward in a constructive manner towards its goal. Our membership holds many views on the subject of whether the Boards should be consolidated, and the legislative committee may ultimately agree to disagree and thus take the matter no further. Nevertheless, I think Pete is moving us in the right direction and that at the least we must give our members an opportunity to be heard on this and other issues that may ultimately affect all our livelihoods.

If you are interested in serving on this newly formed committee, please let me know. My e-mail address is bwbonfiglio@wms-jen.com, or you can call me at (202) 659-8201. I intend to hold the first meeting sometime in May and will contact those of you who contact me as soon as I have worked out the details.

I look forward to a meaningful and fulsome discussion of this and other issues that may arise. I would like to thank Hugh Long for including this in *The Clause* and Pete McDonald for moving the ball forward.

Barbara Bonfiglio
Chair, Legislative Committee

Board of Contract Appeals
Bar Association

TREASURER'S SUMMARY REPORT
Joseph McDade

Statement of Financial Condition
For the Period Ending 30 April, 2002

Balance Beginning 3/12/02		$17,045.63
Fund Income:		
Membership Dues&		
Electronic Fund Transfer		$ 945.00
Total Fund income		$17,990.63
Fund Disbursements		
Clause Postage Expenses	$103.00	
Clause Printing	$ 281.11	
Ending Case balance		$17,606.52

FY 2002 Membership Application

Please make your checks payable to: BCABA

(Please print NEATLY as the information provided below is used for the annual BCABA Directory.)

Name: _____

Firm/Agency: _____

Address: _____

City/State: _____ Zip: _____

Telephone: _____ Fax: _____

eMail: _____

Employment: Firm _____ Corporation _____ Government _____

Judge _____ Other _____

NOTE: Paper copies of our quarterly publication, *The Clause*, will be mailed to members who request them. Otherwise, copies will be posted to the BCABA website (www.bcabar.org), and members will receive an email when the issues are available.

_____ Yes, I wish to receive a paper copy of *The Clause.*

_____ No, I will get my copy off the BCABA website.

Mail checks to: Joseph McDade, Esq
Office of the General Counsel,
Department of the Air Force
1740 Pentagon
Washington, D.C. 20330-1740